

Indiana Law Review



Volume 30, No. 4 1997

TRIBUTE

Debra A. Falender Tribute by Lawrence P. Wilkins

1996 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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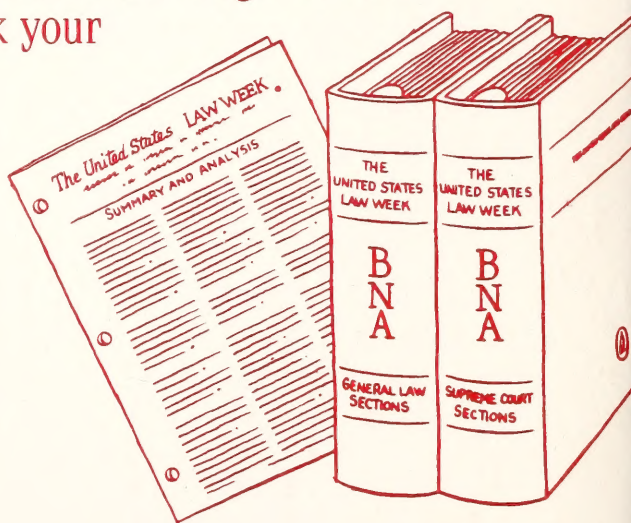
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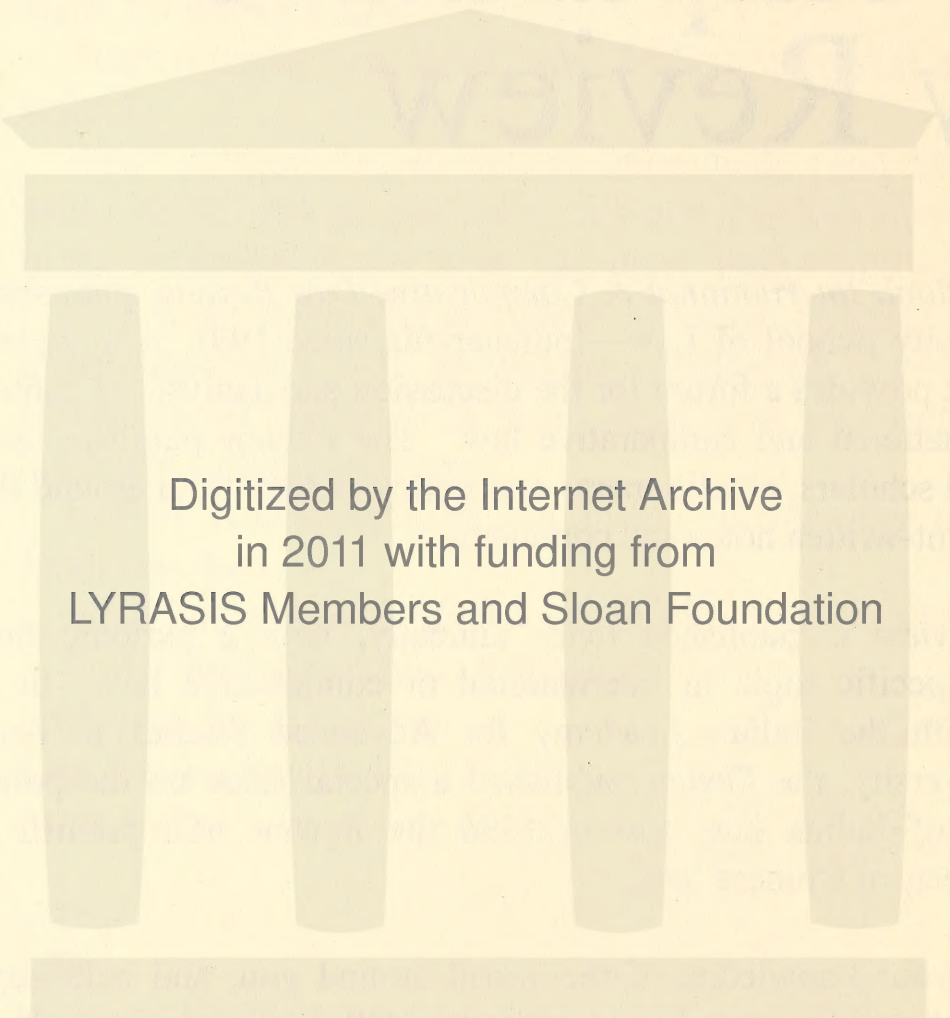
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5 HENRY'S INDIANA PROBATE LAW AND PRACTICE (Forms) (8th ed. J. Kolb & D. Falender 1989) (and cumulative annual supplements).

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Articles:

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Note, *The Proposed New Bankruptcy Act*, 7 IND. L. REV. 852 (1974).

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Lecture, Alternatives to Guardianships, ICLEF Legal Issues for Incapacitated Persons Seminar, Apr. 1992.

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Member, ARC Advisory Committee for the ARC Master Trust, 1988-present.

Park Tudor School

Member, Board of Directors, 1987-93.

Chair, Board Education Committee, 1990-93.

Legal Services Organization of Indiana

Member, Board of Directors, Nov. 1983-May 1989.

Chair, Board Personnel Committee, 1986-89.

TRIBUTE TO PROFESSOR DEBRA A. FALENDER

LAWRENCE P. WILKINS*

Professor Debra Ann Falender retired from law teaching at the end of this term. If you know Professor Falender then you know that she has not even begun to approach the age that most of us must attain to retire. You may then wonder, “why is she getting a *tribute* for quitting early? Here’s a woman still in the bloom of youth,¹ who still has lots of legal educational stuff to do² and she’s *retiring*?” “For Pete’s sake,”³ you may be exclaiming, “she hasn’t earned enough gray hair yet to be allowed to retire!” To those questions I can only reply that she has been hanging around⁴ this place for a quarter century now, and I suppose that is about the time frame when one begins to think seriously about “Golden Years” activities, and she has apparently given in to the impulse.⁵ However, I also have determined that since she has shortened her teaching career by about twenty years or so, this “tribute” need not be in the usual format. If you agree, read on. If you don’t agree, the footnotes may be helpful.⁶

Debra Falender came to Indianapolis to attend prep school, and that move created an immediate shortage of prospects for the cheerleading squad at the Jonesboro, Indiana High School. The wider horizons provided at Tudor Hall School for Girls—doubtless valuable in many ways—alas, held no outlet for Debby’s cheerleading talents. It may well be that her frustration at being deprived of the opportunity for expressing her leadership qualities in that manner shaped her approach to the challenges of adult life.

In pursuit of higher education, she matriculated at Mount Holyoke College. Following the example set by many other college students in her generation she quickly set her sights on her future career, and immediately embarked on a rigorous program of preparation for the profession, majoring in the History of Art. She learned quickly, and soon discovered the fundamental truth of the philosopher’s rhetorical question: “Why spend weeks writing a twenty-page paper

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1. I am not at liberty to reveal Professor Falender’s age, but I can tell you that she has not yet received a solicitation letter from AARP.

2. When she closed her textbook and walked from the classroom for the last time, she cut short by many years, if not decades, a remarkable career in legal education.

3. Actually, she’s retiring for the sake of a family dream of living in the Rocky Mountains of Colorado.

4. She has invested an enormous amount of energy and dedication in the law school’s mission, and she has contributed to the school an unmatched combination of teaching, scholarship and service. Her departure will leave behind a rich albeit unfinished tapestry of legal professional work and collegial relationships.

5. A graduate of this law school, she has been a stalwart of the institution almost from the day she arrived in 1972.

6. Now that you are looking at the footnotes, you probably should know that the text and the footnotes will tell the Debra Ann Falender story in two different ways. I will leave it to you to decide which carries the greater truth.

when an all-nighter the day before it's due will work nicely?" In the little spare time that she allowed herself away from her studies she organized the campaigns of friends interested in running for student government offices.

Upon graduation, she soon brought all of that undergraduate preparation and her new learning in the arts to bear upon practical things. She began work in a family-owned business. Her job was to program computers. During the year that she spent interacting with machines, she also had occasion to observe some exemplary expressions of the lawyerly craft and decided she would give that profession a whirl.

In law school, she quickly established herself as a leader, and emerged from the proving-grounds of first-year classes among the top achievers in her class.⁷ She recalls that first year as involving nearly round-the-clock commitment to scholarly pursuits: (1) playing Bridge; (2) reading all the cases; (3) playing Bridge; (4) making outlines; (5) only then allowing a relaxing round of Bridge. In the second year she was not able to put all of that important groundwork to as much use as she would have liked. She spent most of that year writing a Note for the *Indiana Law Review* and writing a brief for her Moot Court team. She has often lamented that those activities left much less time for Bridge. In her senior year, she decided to while away some idle hours serving as the editor-in-chief of the *Indiana Law Review*.⁸ As the most significant accomplishment of her tenure as editor-in-chief of Volume 8 she counts the last-minute discovery that the word "foreword" had been misspelled in the foreword.⁹

The historical matter you've just read, as you might have guessed, is related to you as Debbi Falender herself told it to me. Now I will tell you what I know of Debbi Falender, my friend and colleague of seventeen years.

Debbi is a very well-organized person and likes things around her to be orderly.¹⁰ Out of the necessities imposed by her busy schedule, she has developed a disciplined and successful method of organizing and accomplishing her tasks and priorities. She devised a list system well before the several well-known self-help manuals popularized the technique of making lists. Her desk top at any given time will contain any number of lists with some items checked, some not, some with lines drawn through, and some lined-through and checked. Before undertaking any important task, she organizes it, considers the feasibility of the organization, perhaps revises the plan, and then carefully executes it according to the plan.

7. She was tied with two others for the top position in her class.

8. Debbi has been a model of organized industriousness for all of us. Welcoming the challenges of balancing her responsibilities as legal educator, community leader, wife (she is married to Steven Falender) and mother (she is the mother of three children: Phillip, Ellen and Mark. She took on the duties of editor-in-chief of the *Indiana Law Review* while she was pregnant with Phillip. Phillip graduated this spring from the University of Colorado. Twins Ellen and Mark are eighth-graders at Aspen Middle School).

9. I am not making this up.

10. She once told me that she didn't care for Jazz or Blues because she doesn't like music that doesn't proceed according to a plan.

Once engaged with a project, her drive to produce an excellent result takes over. She is able to maintain extraordinary focus upon the task, often writing and revising at her desk for long hours at a time without a break. Her ability to tackle and master even the most difficult of legal subject matter is well-documented by her student Note in the *Indiana Law Review* discussing the Report of the Commission on Bankruptcy Laws of the United States of 1973. That Note evaluated the Report's review of the bankruptcy administration system and proposals for revision. Her scholarly efforts for the past decade have been dedicated to the major revision of *Henry's Probate*, a multi-volume treatise that practitioners have found to be a valuable resource. Her marathon efforts on that work have brought it to light for practitioners much sooner than should have been anticipated.

Her clarity of expression in writing has drawn the notice of the U.S. Supreme Court and others. The Supreme Court relied heavily upon her 1985 law review article on notice to creditors in estate proceedings, and several commentators since have written analyses of her approach.¹¹ She has, in her scholarship, added to the language of the law, coining the terms "short term" and "long term" nonclaim statutes¹² to refer to statutes barring claims of a decedent's creditors who fail to timely present their claims against the estate.

She has often dealt with faculty governance issues using her powers of gentle persuasion and Socratic dialogue in dealings with colleagues.¹³ Her technique is so natural, yet so refined—and so quick is she to give credit to others—that those who enter dialogue with her often leave it feeling as if the ideas that develop from the discussion are their own and not Debbi's. Whether in discussions or her writings, whether in informal exchanges, classroom dialogue, or formal faculty debates she has, over the years, expressed an abiding concern for careful deliberation of the issues and fairness to all participants in that deliberation as well as a concern for good results.¹⁴

11. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 479-80, 488-89 (1988). See Sarajane Love, *Estate Creditors, the Constitution, and the Uniform Probate Code*, 30 U. RICH. L. REV. 411, 428-30, 437, 456 (1996); Thomas L. Waterbury, *Notice to Decedents' Creditors*, 73 MINN. L. REV. 763, 779 (1989).

12. Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. REV. 659, 667-69 (1985). See Waterbury, *supra* note 11, at 764 n.9, 771 n.50.

13. Not always fully appreciated by some.

14. Examples in her scholarship alone will suffice. See, e.g., Debra A. Falender, Note, *The Proposed New Bankruptcy Act*, 7 IND. L. REV. 852, 879 (1974) ("The recommendations of the Commission for changes in the substantive law affecting wage earner plans evidence an attempt to more realistically balance the interests of debtors and creditors in the hope of fostering such plans."); Falender, *supra* note 12, at 706 ("Estate proceedings cannot use tradition and inertia to justify unfairness."); Debra A. Falender, *Protective Provisions for Surviving Spouses in Indiana: Considerations for a Legislative Response to Leazenby*, 11 IND. L. REV. 755, 796 (1978):

One thing is clear, especially after *Leazenby*: The legislature must act if anything is to be done to prevent overprotection and underprotection of surviving spouses in Indiana. The *Leazenby* court should not be criticized for refusing to assume the responsibility for

She has continued to fulfill her early promise of leadership. She helped found a group of colleagues on the faculty who call themselves the Female Law Faculty. This group, referred to by its acronym, "FLF," and pronounced, with tongue in cheek, "fluff," always seems to have a marvelous time in its luncheon discussions. I cannot tell you much about this group or its activities because I have been summarily and most unjustly denied participation. I do know that several female faculty members consider Debbi to be a mentor.

Debbi has maintained a tireless loyalty and dedication to the law school. In 1987 she chaired the dean search committee that recruited Norman Lefstein as the dean of the school, and Norm's tenure has been one of the longest in the school's history. Shortly after assuming the office, Norm showed his gratitude to her by asking if she would assume the duties of Associate Dean for Student Affairs, which she did for two years.

Debbi has readily, if not eagerly, accepted and applied modern technology to her tasks. In the early years of incorporation of desktop computing into professorial tasks, the machinery in Debbi's office always represented state-of-the-art. When presentation software offered valuable new ways for helping students grasp and interact with material, Debbi quickly adopted it in her teaching technique.

In her teaching, she has applied all of her stellar qualities of organization, leadership, dedication, loyalty, perspicacity, and clarity of expression. Her first thoughts are always for her students, and she has constantly striven to find new opportunities for learning in the law school experience. Her classroom demeanor, teaching skills and technique were a combination favored by students, and her advanced level courses were always over-subscribed. She was also a leader in efforts to incorporate concerns for ethical principles in the curriculum.

As Debbi moves from her shortened but stellar teaching career to other pursuits,¹⁵ she will be long remembered here as an excellent teacher, administrator, and colleague. More importantly, we will miss her as our friend, and we will look forward to her visits with great anticipation.

counteracting underprotection. The responsibility for counteracting both underprotection and overprotection is that of the legislature.

15. She says she is leaving the best job in the world to live in the best place in the world. *See supra* note 3.

REFLECTIONS ON A DECADE AT THE INDIANA SUPREME COURT, 1987-1997

RANDALL T. SHEPARD*

The Supreme Court of Indiana entered the 1990s freed from the numbing onslaught of direct criminal appeals which had characterized the previous decades and crowded out both civil appeals and managerial tasks. With the voters' approval of Proposition Two, an amendment to the Indiana Constitution,¹ an expanded Indiana Court of Appeals began reviewing all criminal appeals with sentences of less than fifty years. Death penalty cases and cases with sentences of fifty years or more remained within the direct jurisdiction of the five members of the Supreme Court.

It is perhaps fitting, although it is not a source of pride, that we will end the 1990s in much the same shape as we began. The number of direct criminal appeals is again trending upward and threatening once again the Court's ability to review important civil cases. Despite that shadow, which will require serious attention in the near future, the past ten years have been marked by notable success and spread with seeds that will grow into positive results in the years to come.

I. BENEFITS TO THE COMMUNITY, ACCESS AND EDUCATION

Several broad themes mark the Court's work over the past ten years. The Court has made partnerships with a good many people interested in the welfare of the legal system, producing great benefit to the community at large, providing greater access to justice for many Hoosiers, and enhancing the education and training of our state's attorneys and judges.

For example, we have issued new rules opening up the process of attorney discipline, sweeping away much of the mystery that has surrounded the workings of Disciplinary Commission.² To get a better feel for how the public views attorneys and their conduct, this Court also expanded the Disciplinary Commission to nine members to include two lay members who are not attorneys.³ Through the work of many members of the Indiana State Bar Association, the Court is on the brink of amending the Rules of Professional Conduct to allow an Interest on Lawyers Trust Account program. Revenue from that project will underwrite a statewide pro bono initiative that will enable people of modest means to find competent, free legal help. The Indiana program for mandatory continuing legal education, about to mark its tenth anniversary, places lawyers and judges in classrooms some 150,000 hours a year. Most recently, we amended the CLE rules

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1. IND. CONST. art. VII, § 4.

2. The file on pending cases will now be open for inspection in the office of the Clerk of the Supreme Court. Moreover, we have strengthened the rules on open attorney discipline hearings. In the past, these hearings, while presumptively opened to the public, had usually been closed in practice. Our new rule change makes it expressly clear that the public will be able to attend these hearings in all but the most unusual circumstances. IND. ADMIS. DISC. R. 23, § 22.

3. *Id.* § 6(b).

to require at least three hours of ethics or professionalism training during each three-year legal education period.⁴ This change, I believe, will help remind all of us of our duty to clients and to the public.

The public now has greater access to justice through several other changes approved by the Supreme Court. Through collaboration with our colleagues in the Indiana State Bar Association, the Court has prompted a greater use of Alternative Dispute Resolution as a means of resolving legal disputes. The Court's new rules on mediation, arbitration, and other techniques have affected a major shift in the means by which we solve client problems. A new, state-wide list of qualified mediators maintained by the staff of the Commission for Continuing Legal Education will make it easier for trial judges and litigators to select mediation instead of following the traditional route through the court room.

The Court has also tried to bring its own operations closer to the people it services in three ways. On a regular basis, the Court has left the State House and held oral argument in high school auditoriums, court rooms, civic auditoriums and city council chambers. In fact, between September 1996 and November 1997, the Court traveled to Evansville, Fort Wayne, South Bend, Merrillville and the Marshall County community of Bourbon. On an experimental basis, our oral arguments may now be recorded by the news media, both by video camera and still photography. Overall, the response to this experiment has been positive. On another electronic front, Indiana appellate opinions are now available over the Internet—a move that puts the Indiana judicial system into the den or living room of anyone with a computer and a modem. The number of times each week that someone sitting in Pokagon or Pakistan downloads one of our opinions continues to amaze me.

II. SECOND WIND FOR THE INDIANA BILL OF RIGHTS

One of the noteworthy developments the last ten years that is particularly gratifying to me is the rejuvenation of the Indiana Constitution and its Bill of Rights. Like many state constitutions, this state's constitution frequently offers greater protections to individual freedom than can be found in the U.S. Constitution. For example, one hundred and nine years before the U.S. Supreme Court determined that a criminal defendant had a right to an attorney at public expense in the landmark case of *Gideon v. Wainwright*,⁵ the Indiana Supreme Court had already reached the same conclusion.⁶ This is but one of many similar stories.⁷ As new cases come to our Court, we see Hoosier litigants more frequently asserting claims grounded in the Indiana Constitution as well as the U.S. Constitution. We on the Court believe this is a healthy trend and that the Indiana Supreme Court is the best place to do it. After all, as has been said

4. IND. ADMIS. DISC. R. 24, § 3(a).

5. 372 U.S. 335 (1963).

6. *Webb v. Baird*, 6 Ind. 13, 18 (1854).

7. See generally Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

colloquially, "It's a mighty sorry frog that won't croak in its own pond." My colleague Justice Brent Dickson and former Justice Jon D. Krahulik have both given their time to teach courses on state constitutional law in Indiana's law schools. The Court itself promoted such study with its decision to include state constitutional law on the bar examination.

III. PROPOSITION TWO: "DEJA VU ALL OVER AGAIN"

One of the great joys of recent years has been the ability of the Court to delve more substantially into questions of civil law that had not been given their due consideration because of the crush of direct criminal appeals from defendants who had the automatic right to challenge any sentence of ten years or more. Although matters of criminal law are of great importance to the individual defendants and to victims, the issues asserted usually centered on a handful of regularly litigated, common issues. Committing the time of the Supreme Court to the resolution of these cases did little to resolve conflicts between the panels of the Court of Appeals or fashion Indiana criminal law into a more relevant existence.

The results of the 1988 constitutional referendum were dramatic and quick. A few statistics reveal this story quite succinctly. In 1986, fully ninety-three percent of our cases were direct criminal appeals. By the end of 1989, this court was able to double the number of civil legal opinions it issued to forty-two. In 1992, I proudly announced to the Indiana General Assembly that our backlog had been "whipped." By 1995, it took an average of just 5.8 months to prosecute an appeal before the Indiana Supreme Court. The Court blossomed during this period and offered substantial justice to many people who waited far too long for answers to nagging civil legal questions.

That positive news is overshadowed by some troubling numbers. The number of direct criminal appeals of sentences of more than fifty years is beginning to creep upward again. The legislature has recently decided that fifty-five years should be the standard prison term for murder.⁸ Accordingly, the number of direct appeals jumped fifty-one percent in 1996 alone. To my chagrin, it is quite likely that we will have to revisit the issue of direct criminal appeals in the near future.

IV. SUPREME COURT OPERATIONS: CHANGING PEOPLE AND PROCEDURES

The past ten years also saw the departure of four justices and the arrival of three new ones. There were also substantial changes in policy and procedure and the birth of a half-dozen new programs. During this period, two of the veteran workhorses of the Supreme Court, Richard Givan and Alfred Pivarnik, left the Court. Justice Givan, a long-time Chief Justice, once said he personally knew one-third of the justices of the Indiana Supreme Court. That is a record that will not likely be matched. This period was also marked by the departure of Justice Roger DeBruler in the summer of 1996 after more than a quarter century of service from the bench of the Indiana Supreme Court. His wisdom and wit, bolstered by solid Hoosier common sense, was a valuable commodity.

8. IND. CODE § 35-50-2-3(a) (Supp. 1996).

The bench was refreshed from the private sector, however, when respected attorney Jon D. Krahulik joined the court to replace the retiring Justice Pivarnik. When Justice Krahulik departed after a brief but energetic stay, Governor Evan Bayh tapped his former budget director, Frank Sullivan, Jr., to take his place. When Justice Givan later ended his career, Governor Bayh made history by selecting Myra C. Selby to become the first woman and African-American to sit on the Indiana Supreme Court. Finally, completing the transition to our current Court, well-known attorney and civic leader Theodore "Ted" Boehm was named to take the place of Justice DeBruler.

This succession of capable leaders made progressive changes in how the Court manages the legal system. Rule changes were made to bring closure to capital punishment cases more quickly. Our court limited the number of successive post-conviction relief hearings that could be filed. We also streamlined the process for setting an execution date by removing several ministerial steps that normally followed the denial of a petition for post-conviction relief. We also required attorneys to prepare a case management plan that is designed to move the case along at an appropriate speed.⁹ We also applied technology in the battle against delay. By making use of computer-aided transcription techniques, we reduced the length of time it takes to prepare the record of proceedings in a capital case from eighteen months to just ninety days.

Accompanying these reforms aimed at speedier disposition, our Court also determined that Indiana defendants facing society's ultimate penalty would not risk death without the assistance of competent counsel. Indiana became the second state to specify the qualifications an attorney must have before he or she can represent a defendant charged with the death penalty¹⁰ or prosecute a convicted death row inmate's appeal.¹¹ We also directed trial court judges to weigh an attorney's workload before assigning a death penalty case to insure that the attorney has adequate time to devote to the case.¹² All of these changes came before the Anti-Terrorism and Effective Death Penalty Act of 1996¹³ put restrictions on federal habeas petitions.

The Supreme Court and its staff, commonly with help from the profession and the other branches of state government, also established a wealth of new programs that affected Hoosiers every day through statewide programs and though internal changes to the day-to-day operations of the Court. Between 1987 and 1997 the Court:

- ◆ Created a records management program in the Division of State Court Administration
- ◆ Formed the state's first guardian ad litem program

9. IND. CRIM. R. 24(H).

10. IND. CRIM. R. 24(B)

11. IND. CRIM. R. 24(J).

12. IND. CRIM. R. 24(B)(3).

13. Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-1226 (codified at 28 U.S.C.A. §§ 2244, 2253-2254, 2261-2266 (West Supp. 1997)).

- ◆ Staffed the Indiana Public Defender Commission created by the legislature
- ◆ Issued formal guidelines for the certification of probation officers
- ◆ Established rules for issuing limited law licenses to Foreign Legal Consultants
- ◆ Developed guidelines for Indiana's paralegals
- ◆ Joined a twenty-state study of minority student law school and bar examination performance
- ◆ Helped establish an American Inn of Court in Indianapolis
- ◆ Created a summer internship program for Indiana law students
- ◆ Employed professional librarians for the Supreme Court law library
- ◆ Hired former Indianapolis Star reporter David J. Remondini to handle special projects, work with the news media and oversee the day-to-day operations of my office.

We also undertook, in a historic first, management of the office of the Clerk of the Supreme and Appellate Courts when former Clerk Dwayne Brown was under indictment for misconduct in office. It was task that we did not seek, but think it was handled responsibly.

V. OUTREACH TO THE COMMUNITY

One of the Court's hallmarks for the last ten years, I like to think, has been its efforts to bring the judicial system closer to the public. This has been accomplished in several ways. The primary way we interact directly with the public is through the use of oral argument. Frequently, these sessions change at least one vote on a given case. It is a excellent way to flesh out a question or gain a new perspective on a well-litigated issue. This Court has also made a commitment to hold oral argument in *every* death penalty case. The number of arguments has doubled over the last decade.

As noted earlier, the Court voted in the summer of 1996 to try a one-year experiment allowing cameras and recorders into its oral arguments. This effort was greeted by a torrent of coverage in the early days of the experiment. Reporters came to the courtroom in part because they could bring their equipment. Coverage has subsequently dropped off dramatically, a reflection of reporters' estimates of the newsworthiness of a given oral argument. This experiment has also not come without controversy or disruptions. Allowing video cameras into the oral argument when the Court traveled to some cities raised an already high-profile case to an even higher level. In the process, the emotions of some of the victims' families were bruised by television promotions and newscasts surrounding the argument.

During two oral arguments, journalists violated the Court order limiting movement during the argument. There was minimal disruption in the first situation but in the second, the television news photographer was chastised from the bench for attempting to walk up onto the stage where the Court was seated. On balance, however, the experiment has been successful, and I anticipate that the Court of Appeals will soon make a decision on whether to allow cameras into its arguments.

This Court also expanded its commitment to hold arguments outside its Indianapolis court room.¹⁴ On many occasions as we traveled around the state, we were able to take questions from the audience and interact directly with the people we serve. This is particularly interesting when we appear before a group of students. The candor and perception of their questions is frequently invigorating. It has also been gratifying to see how these young people, especially the young women, respond to Justice Selby. Clearly, she has become a strong symbol of accomplishment to them.

Like any organization, the Supreme Court has been swept up in the electronic information age. At times, the choices and opportunities connected with this new era seem overwhelming, but the Court has taken advantage of these opportunities to make its operations more accessible. The Indiana judicial system now has its own home page¹⁵ with links to our Court, the Indiana Court of Appeals, the Indiana Tax Court, some of Indiana's trial courts, and the appellate decisions maintained by the Indiana University School of Law—Bloomington.

Through cooperation with the Clerk of the Supreme and Appellate Courts, appellate decisions can be reached via an electronic bulletin board as well. Parties to an appeal may also ask the Clerk to transmit orders and opinions by facsimile.¹⁶ This has solved the long-standing problem experienced by lawyers whose clients first heard the news of the decision in their cases over radio or television.

Many of us on the Court have had to become quite familiar with the newest technology, as each of us have been issued laptop computers. These latest acquisitions are part of the network of some 200 instruments in use by judges, law clerks, secretaries, and record keepers. Ten years ago, most Indiana appellate opinions were prepared on typewriters.

VI. RULE CHANGES THAT PROTECT CLIENTS AND AID THE COMMUNITY

The Court has also worked to improve its own rules and procedures concerning the practice of law. With the help of hundreds of volunteers, ancient rules have been updated to reflect the modern practice of law and entirely new programs have been created.

We have toughened the rules attorneys must follow to get admitted to the bar of Indiana by adopting detailed standards for determining character and fitness. We also decided to permit only graduates of accredited schools to sit for our bar examination. Finally, we required every applicant to take the Multistate Professional Responsibility Examination (MPRE). The MPRE is a far more rigorous test of ethical considerations than the previous test that we had used for many years.

For the first time in many years, the Indiana Bar Examination has been re-

14. During the decade, we have held court in Gary, Merrillville, Valparaiso, South Bend, Notre Dame, Fort Wayne, Lafayette, Rochester, Bourbon, Terre Haute, Bloomington, Columbus, Clarksville, and Evansville.

15. *The Indiana Judicial System* <<http://www.air.org>>

16. IND. APP. R. 12(F).

formatted. Bar examinees will now answer twenty questions instead of twenty-five. Beginning in 1998, a question on family law replaces the question on equity. The Court concluded that a question on family law was far more relevant to today's practitioners and clients than a question on the somewhat arcane subject of equity.

One rule change implemented recently is a new requirement for the financial institutions which maintain attorney trust accounts. These accounts hold client funds and need to be monitored scrupulously.¹⁷ It has been our experience, and the experience of other states, that a series of "bounced" checks on an attorney trust account is a signal of a possible problem with the account or the attorney who maintains it. Beginning in 1997, all financial institutions with attorney trust accounts were required to tell our Disciplinary Commission if a check drawn on that account was dishonored.¹⁸ We believe this change will protect clients and the funds they entrust to their attorneys.

In another change that affects trust accounts, Indiana became the fiftieth state in the nation to approve in principle an Interest on Lawyers Trust Account (IOLTA) program. Normally, small amounts of client funds held for a short period in a lawyer trust account do not generate enough interest to cover the administrative costs of figuring the interest, mailing a check to the client, and reporting that interest to the Internal Revenue Service. In light of those practical problems, client funds are normally held in non-interest bearing accounts. Under an IOLTA program, the interest from these trust account funds is pooled, collected, and used for a beneficial public purpose. In Indiana, our Court has determined that the funds should underwrite a statewide Pro Bono Initiative that will encourage attorneys to provide free civil legal help to people of modest means.

Three teams of attorneys and legal service professionals have worked since the fall of 1995 to craft both the IOLTA and Pro Bono programs. In 1997, the Court opened negotiations with the Indiana State Bar Association and the Indiana Bar Foundation with the hope that those organization would be willing to run both programs. The discussions are still underway but there is every reason to believe they will be successful.

As part of an overall effort to encourage pro bono work, the Court's Pro Bono Initiative Committee has proposed asking attorneys to report the number of pro bono hours they work. The same committee has also recommended that the Rules of Professional Conduct be amended to suggest an aspirational goal of contributing at least fifty hours of pro bono work each year. The Court hopes to tackle these rule changes yet this year.

One epic rule change that has made trial court operations more orderly is the adoption of the Indiana Rules of Evidence in 1994. Teams of attorneys and law professors worked tirelessly to codify 175 years of common law into a single, concise format. Both lawyers and the public should find this set of rules easier to use.

17. IND. R. PROF. COND. 1.15(a).

18. IND. ADMIS. DISC. R. 23, § 29.

This Court also changed the Indiana Rules of Trial Procedure to prohibit parties from demanding any specific monetary amounts in lawsuits. This change ended the practice of listing phenomenal amounts of damages in complaints that often prompted headlines that read, "\$50 Million Dollar Lawsuit Filed," thus helping lower the din against our profession.

This Court also, through a rule change, voted to allow federal district courts to certify questions of state law to the Indiana Supreme Court. This has permitted early resolution of a number of important questions.¹⁹

VII. LEGAL EDUCATION CHANGES THAT PRODUCE BETTER LAWYERS AND JUDGES

Reflecting the changes in modern society, this Court made alterations to the rules on legal education that it believes will produce better lawyers and judges. For all legal practitioners, bench and bar alike, the Court adopted mandatory Continuing Legal Education requirements. The Court also sponsored in 1996 a conference that was designed to teach CLE presenters how to use the most effective training techniques for adult education. Indiana became one of the first states to adopt the American Bar Association's Model Rules of Professional Conduct. Earlier this year, the Court supported the Conclave on Legal Education, which was designed to bridge the gap between law school education and the actual practice of law.

With respect to judges, the Court directed a more efficient organization of the Commission on Judicial Qualifications, adopting a unified set of procedural rules and employing full-time counsel to the Commission. The Commission also began publishing reports about judicial discipline cases and it created a system of Advisory Opinions. For the first time in a generation, we revised the Code of Judicial Conduct.

One of our finest achievements with regard to the education of judges has been the two-year Judicial Graduate Studies Program for judges. Competition for the thirty slots has been intense, and many judges who have taken part in this substantive two-year program wish a third year would be added. The Indiana Judicial Center has also continued its fine tradition of educating the state's judges through its regular conferences and seminars.

VIII. TRIAL COURT OPERATIONS

One of the Court's constant goals over the last ten years has been to improve the management and efficiency of Indiana's trial courts. We have done this through changes in how records are managed and stored, as well as by campaigning for a pay raise that has had a positive effect on recruitment and retention of our trial court judges.

Through the efforts of the Division of State Court Administration, the Court has directed a massive project to standardize the way trial court records are kept on computers. The Automated Information Management System (AIMS) will

19. IND. APP. R. 15(O).

make it easier for courts and other government agencies to transfer records and information electronically.

In an effort to make better use of Indiana trial court judges in special judge cases, the Court adopted a new rule that allows trial judges in each of the state's fourteen judicial administrative districts to design its own plan to handle special judge issues more efficiently.²⁰ These multi-court plans follow successful similar efforts on criminal case assignment and facsimile filings.

In the records management area, the entire judicial system has made great gains in getting a handle on the paperwork monster that generates about 20 million court documents each year. We have been able to separate the wheat from the chaff and systematically dispose of 5400 file cabinets worth of paper in the last ten years. In an effort to keep the flow of paper from growing even larger, we have adopted rules that will allow certain portions of appeal records to be filed in computer disk format. We are also preceding with an experiment for computer-assisted transcription at the trial court level.

In addition to managing paperwork and people better, we now have a tool to better manage the entire court system. Late last year, the first Weighted Caseload Study was presented to the Court by a committee chaired by Wayne Superior Court Judge Thomas P. Snow. It confirmed what many of us knew intuitively. Some trial courts were far busier than others. This new tool will now make it easier for us to make informed decisions about where new trial courts are needed.

The sometimes contentious issue of child support also became part of the Court's responsibility over the last ten years. A candid and thoughtful discussion between the three branches of Indiana government led to a consensus that the court system was better situated to establish child support guidelines. Those guidelines were adopted for the 1992-1996 cycle, and they are now under review again.

During the last ten years many civic-minded people fought for an increase in judicial pay. Indiana traditionally ranked near the lowest in terms of judicial compensation. Low pay was one of the reasons that just fourteen out of 5800 lawyers in the second district applied for a previous opening on the Court of Appeals. After the legislature approved increased pay, the number of applicants for openings on the Supreme Court jumped, in part because the increased salary expanded the pool of lawyers willing to consider the judiciary as a career. This same phenomenon at the trial court level made the 1996 class of new judges the largest in two decades.

IX. PROBATION

In the last ten years our Court has made a concerted effort to professionalize the delivery of probation services in Indiana. A strong probation system is central to public safety: at any one moment more than 100,000 people are on probation in Indiana. Through the efforts of many people the Court helped develop a uniform system used to determine the appropriate level of supervision that a person on probation should receive. The Judicial Conference also adopted

20. IND. TR. R. 79(H).

minimum compensation standards for probation officers. Indiana also joined the Interstate Probation Compact, allowing Indiana to send and receive probationers with other states.

X. JUVENILE PROGRAMS

Problems facing children have always been a great concern to our Court. Justice Frank Sullivan, Monroe County Judge Viola Taliaferro and I lead a commission that is reviewing everything the legal system does with respect to children who are abused or neglected. I believe our work will soon provoke important changes in the way our courts handle children. Our Court has also supported mandatory divorce counseling for families with children. We believe that this type of training will help families cope with the problems associated with divorce.

Through the efforts of local and state officials, the Court has advocated finding a better way to purchase foster care placement services. By being a better buyer of these services, the Court has been able to help state and local governments save money. A gubernatorial task force chaired by Justice Frank Sullivan when he was budget director fashioned several proposals that have already been implemented.

The Supreme Court and the Court of Appeals have also taken steps to make sure that problems facing children are given quick attention. Appeals involving children are now moved to the front of the line. In general, one of these appeals only takes about five months to complete, about half the time required just two years ago.

XI. MINORITIES, WOMEN & PEOPLE OF LIMITED MEANS

The Supreme Court during the past ten years has worked to put minorities and women into positions of responsibility. It has done so with staff positions within the Supreme Court as well as with the appointments it makes to various Supreme Court boards and commissions. When we appoint special judges and hearing officers, we try to make sure that the people in those positions reflect the makeup of our community. The Court has also been gratified to see increases in the number of women on the bench. In 1985, there were just eighteen women judges. But, by 1990 that number had increased to thirty-two. A few of these first came to judicial office by Supreme Court appointment. Still, more work needs to be done. The number of African-American judges is still far too low. In the hopes of rectifying this situation, the Supreme Court, during the last legislative session, advocated the creation of an Indiana version of the Conference for Legal Education Opportunities (CLEO). We hope that this will enable many more people from limited economic backgrounds to enter the practice of law.

XII. LOOKING TO THE FUTURE

Most of what I have written here is retrospective, and I do not mean to suggest that we have by any measure "finished" the work that needs doing on Indiana's system of justice. There are hosts of important reforms that will fill our agenda for

years to come. If anything, this decade of change has seemed to generate interest and support for addressing our problems and opportunities more rapidly. This account of our collective record over the last decade suggests a legal community committed to sensible and substantial change. The bench and bar have every reason to be proud of this record and every reason to be confident as we tackle new challenges.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 1996*

KEVIN W. BETZ**
ANDREW T. DEIBERT***

In 1996, the Indiana Supreme Court again became limited by a huge increase in its mandatory docket, and—perhaps because of this increase—also became an even more aligned court. These are the primary themes from this sixth annual study of the Indiana Supreme Court's docket, dispositions and voting.

The most significant result from this year's study is that the court again is becoming overwhelmed by its docket of mandatory cases. The court fought this battle in 1988 when it won approval from the electorate for a constitutional amendment, which in effect decreased its load of mandatory cases and allowed the court to fulfill its role as a court of last resort.¹ Beginning in 1992, the court had at least a 10% larger docket load of discretionary cases than mandatory cases. This trend, however, was reversed in 1996. From 1995 to 1996 the court's mandatory docket jumped from 46 to 68 cases, while discretionary cases that the court decided declined from 76 to only 48. This is the least number and lowest percent of discretionary cases decided by the court in at least six years, and this is

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301, (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Krieg DeVault Alexander & Capehart for its gracious willingness to devote the time, energy, and resources of its law firm to allow such a project as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard; but, of course, any errors or omissions belong to his former law clerk. We also thank WESTLAW® for its kind willingness to allow us free access to its computer resources and assistance in preparing these Tables.

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1. See Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988); Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

the highest number and highest percent of mandatory cases since 1991.² This increase in mandatory appeals and decline in the court's discretionary caseload also comes at a time, ironically, when the court is receiving record levels of petitions to transfer. Last year the court received 793 petitions, which was a record high at the time. This year the court received a new record high of 807 petitions.³ Thus, although demand is at an all-time high for discretionary cases to be heard by the court, the room on the court's docket for such cases has diminished to at least a six-year low.

Perhaps due to a docket loaded with typically less divisive mandatory appeals, the court is also a more aligned court. Last year, it was first noted in this study that the court displayed an increasing consensus. This was derived from the court's dramatic decrease in both split opinions and dissents as well as the court handing down the highest percentage of unanimous opinions since the beginning of the study in 1990. In 1996, the number of split opinions and dissents decreased again, and the percentage of opinions decided by a unanimous court also rose again. The reasons underlying this shift to greater consensus are likely because of a less discretionary docket and changes in personnel. Justices Givan and DeBruler, two of the most prolific dissenters in recent court history, have been replaced by Justices Selby and Boehm, who thus far seem to be more moderate voices on the court.

The following is a description of the highlights from each Table.

Table A. In 1996, the supreme court issued 120 opinions that were authored by an individual justice. The court also issued 41 per curiam opinions, largely devoted to attorney discipline matters. Seventy-nine of the 120 opinions analyzed criminal cases and 41 analyzed civil matters, which is a decrease from 52 opinions on civil matters in 1995. This drop in the court's docket of civil matters is also a consequence of the increase in mandatory cases which are predominantly criminal cases while civil matters reach the court largely through the discretionary process of transfer.

Chief Justice Shepard authored the most opinions with 33, and Justice Sullivan was next with 27. Justice Sullivan dissented more than any of his fellow

2.			
	MANDATORY	DISCRETIONARY	TOTAL
1991	109 (53%)	98 (47%)	207
1992	64 (41%)	93 (59%)	157
1993	60 (44%)	77 (56%)	137
1994	60 (45%)	73 (55%)	133
1995	46 (38%)	76 (62%)	122
1996	68 (59%)	48 (41%)	116

The court's increased caseload in 1996 of mandatory criminal appeals, i.e. appeals of cases involving a sentence of more than 50 years for a single offense, is likely linked to the Indiana General Assembly recently increasing the presumptive sentence for murder from 50 years to 55 years. *See* IND. CODE § 35-50-2-3 (Supp. 1996).

3. INDIANA SUPREME COURT ANNUAL REPORT (1996).

justices with 10, and he also was the leader in separate concurrences with 14. Justice Dickson had the next highest number of dissents with eight. Overall, the number of dissents dropped from a five-year low of 51 in 1995 to a new record low of only 33 last year.

Justice Boehm, who replaced Justice DeBruler, joined the court on August 8, 1996 and participated in 64 cases. He authored eight criminal opinions, four civil opinions and one dissent.

Table B-1. For civil cases, Justices Dickson and Selby were the most aligned at 86.8%, while Justices Dickson and DeBruler were next at 85.7%. Justices DeBruler and Sullivan were the least aligned at 71.4%. Justices Sullivan and Shepard were aligned in 72.5% of cases. Justice Dickson was the most aligned overall in civil cases, and Justice Sullivan was the least aligned overall. Justice Boehm was involved in only 11 civil cases in 1996 and was aligned with all justices in all of those opinions.

Table B-2. For criminal cases, the two most aligned justices were Shepard and Selby at 92.4%. The two least aligned justices in criminal cases were Dickson and DeBruler at 73.3%. Chief Justice Shepard and Justice DeBruler were right behind at 75.5%. The most aligned with all of the justices in criminal cases was Chief Justice Shepard with Justice Selby close behind, while the least aligned overall was Justice DeBruler.

Justice Boehm was involved in only 34 criminal cases in 1996, but showed a high-level of alignment in these cases with Justice Dickson at 97% and Chief Justice Shepard at 94.1%.

Table B-3. For all cases, the two most aligned justices were Selby and Dickson at 88.1%. Justices Dickson and Shepard were close behind at 87.5%, while Chief Justice Shepard and Justice Selby were at 87.2%. The two least aligned was a tie between Justices Dickson and Sullivan at 76.6% and Justices Shepard and Sullivan at 76.6%. The least aligned members of the court were Justice DeBruler and Justice Sullivan, who also had the highest number of dissents and separate concurrences. The most aligned justice overall was Justice Selby. For the 45 cases in which Justice Boehm participated, he showed an extremely high degree of alignment with the rest of the court.

Table C. In 1995, the court showed its highest degree of unanimity in the five years of this study at 69.6%, but in 1996 the level of unanimity became even greater. Last year, the court was either unanimous or unanimous with a concurrence in 78% of its opinions.

Table D. In 1995, the court also had its fewest number of 3-2 decisions in the five years of this study at 12, but that number dropped again in 1996 to only seven. Justice Dickson was in the three-justice majority in all seven, and Chief Justice Shepard was in the majority in six of the seven. The three-justice majority that collaborated the most was Chief Justice Shepard, and Justices Dickson and Selby in four of the split opinions, which were all criminal opinions. (This is a

continuation of the dominant three-justice majority in 1995. Justices Shepard, Dickson and Selby collaborated in five of the 12 split opinions in 1995.) Justice Sullivan was not included in any three-justice majority in 1996.

Table E-1. As discussed earlier, the court's mandatory caseload has again dominated the court's docket, which reverses a four-year trend that started in 1992. Interestingly, in 1996 the court affirmed the highest percent of cases since 1991 when it affirmed 59% of its cases. In 1996, 56.8% of the cases were affirmed and 43.1% were reversed. This is likely because in 1996 the court's docket had such a high percentage of non-divisive mandatory cases in which the court affirmed the trial court's decision. In cases the court accepts for transfer, which are discretionary, the court has a much higher reversal rate. In 1996, the reversal rate was 74.1% for civil transfer cases and 61.9% for criminal transfer cases. The court's affirmance rate for direct-mandatory criminal appeals jumped from 66% in 1995 to 82.7% in 1996.

Table E-2. This is a new Table for this study. It examines the disposition of petitions to transfer by the court each year. This is the portion of the court's docket that is totally discretionary. In 1996, the court disposed of 807 petitions to transfer; 364 civil, 423 criminal and 20 juvenile. The court granted 32 (8.8%) of the civil petitions, 21 (5.0%) of the criminal petitions and one (5.0%) of the juvenile petitions. A total of 54 (6.7%) petitions were granted and 753 (93.3%) were denied or dismissed. In addition, of the petitions that were denied (753), 129 (5.8%) of those petitions received at least one or two votes by members of the court to grant transfer even though the petition was ultimately denied by vote of the other members.

Table F. As for selected subject areas, the court continued its strong interest in the Indiana Constitution with nine opinions in this area of law, after dropping to only three last year. The court also showed an interest in environmental law, disposing of four such cases. The court ruled upon five death penalty cases, affirming four and reversing one.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	23	10	33	2	2	4	1	3	4
DeBruler, J. ^e	4	4	8	2	1	3	5	1	6
Dickson, J.	11	8	19	0	2	2	4	4	8
Sullivan, J. ^e	16	11	27	10	4	14	4	6	10
Selby, J. ^e	17	4	21	3	0	3	2	2	4
Boehm, J. ^e	8	4	12	0	0	0	1	0	1
Per Curiam	0	41	41						
Total	79	82	161	17	9	26	17	16	33

^a These are opinions and votes on opinions by each justice and in per curiam in the 1996 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.* at 210.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions. It does not include rehearing opinions nor 20 orders handed down on disciplinary matters. The court handed down 59 orders or opinions on attorney disciplinary matters and one opinion or order on a judicial disciplinary matter. Of those 60 orders or opinions, 38 were handed down as per curiam opinions and 12 were signed by individual justices. Also, the following six miscellaneous cases are not included in this Table: *Bryant v. State*, 1996 WL 274119 (Ind. 1996) (misc. order clarifying prior opinion); *Walker v. State*, 1996 WL 367638 (Ind. 1996) (unpublished memorandum opinion); *Meyer v. Bierdon*, 667 N.E.2d 752 (Ind. 1996) (appeal dismissed because parties settled litigation); *Ross v. Delaware County Dep’t of Pub. Welfare*, 667 N.E.2d 182 (Ind. 1996) (tie vote on petition to transfer); *Childers v. State*, 668 N.E.2d 1216 (Ind. 1996) (dissent from denial of transfer); *In re Appointment of Temp. Prosecuting Attorney in Knox County*, 671 N.E.2d 420 (Ind. 1996) (appointment of Temporary Prosecuting Attorney in Knox County).

^c This category includes both written concurrences and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e While a member of the court in 1996, Justice DeBruler did not participate in one decision: *Bell v. Clark*, 670 N.E.2d 1290 (Ind. 1996). Justice Sullivan did not participate in one decision: *Ross v. Delaware County Dep’t of Pub. Welfare*, 667 N.E.2d 182 (Ind. 1996). Justice Selby did not participate in six decisions: *Town Board of Orland v. Greenfield Mills, Inc.*, 663 N.E.2d 523 (Ind. 1996), *Medical Licensing Bd. v. Provisor*, 669 N.E.2d 406 (Ind. 1996), *In re Danks*, 669 N.E.2d 992 (Ind. 1996), *In re Brown*, 669 N.E.2d 989 (Ind. 1996), *In re Colman*, 669 N.E.2d 1390 (Ind. 1996) and *In re Whitesell*, 670 N.E.2d 890 (Ind. 1996). Justice Boehm did not participate in two decisions: *City of Lawrence v. State ex rel. IHT Capital*, 670 N.E.2d 8 (Ind. 1996) and *Boehm v. Town of St. John*, 675 N.E.2d 318 (Ind. 1996). Justice Boehm became a member of the court on August 8, 1996, taking the place of Justice DeBruler who retired. In 1996, Justice Boehm participated in 64 opinions or orders.

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES

		Shepard	DeBruler	Dickson	Sullivan	Selby	Boehm
Shepard, C.J.	O		23	31	28	29	11
	S		0	1	1	0	0
	D	---	23	32	29	29	11
	N		28	40	40	38	11
	P		82.1%	80.0%	72.5%	76.3%	100%
DeBruler, J.	O	23		24	19	20	
	S	0		0	1	0	
	D	23	---	24	20	20	---
	N	28		28	28	26	
	P	82.1%		85.7%	71.4%	76.9%	
Dickson, J.	O	31	24		30	33	11
	S	1	0		0	0	0
	D	32	24	---	30	33	11
	N	40	28		40	38	11
	P	80.0%	85.7%		75.0%	86.8%	100%
Sullivan, J.	O	28	19	30		28	11
	S	1	1	0		1	0
	D	29	20	30	---	29	11
	N	40	28	40		38	11
	P	72.5%	71.4%	75.0%		76.3%	100%
Selby, J.	O	29	20	33	28		11
	S	0	0	0	1		0
	D	29	20	33	29	---	11
	N	38	26	38	38		11
	P	76.3%	76.9%	86.8%	76.3%		100%
Boehm, J.	O	11		11	11	11	
	S	0		0	0	0	
	D	11	---	11	11	11	---
	N	11		11	11	11	
	P	100%		100%	100%	100%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 23 is the number of times Chief Justice Shepard and Justice DeBruler agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES⁸

		Shepard	DeBruler	Dickson	Sullivan	Selby	Boehm
Shepard, C.J.	O		34	72	62	72	32
	S		0	0	0	1	0
	D	---	34	72	62	73	32
	N		45	79	79	79	34
	P		75.5%	91.1%	78.4%	92.4%	94.1%
DeBruler, J.	O	34		33	35	35	
	S	0		0	4	0	
	D	34	---	33	39	35	---
	N	45		45	45	45	
	P	75.5%		73.3%	86.6%	77.7%	
Dickson, J.	O	72	33		61	70	33
	S	0	0		0	0	0
	D	72	33	---	61	70	33
	N	79	45		79	79	34
	P	91.1%	73.3%		77.2%	88.6%	97.0%
Sullivan, J.	O	62	35	61		62	26
	S	0	4	0		2	0
	D	62	39	61	---	64	26
	N	79	45	79		79	34
	P	78.4%	86.6%	77.2%		81.0%	76.4%
Selby, J.	O	72	35	70	62		30
	S	1	0	0	2		0
	D	73	35	70	64	---	30
	N	79	45	79	79		34
	P	92.4%	77.7%	88.6%	81.0%		88.2%
Boehm, J.	O	32		33	26	30	
	S	0		0	0	0	
	D	32	---	33	26	30	---
	N	34		34	34	34	
	P	94.1%		97.0%	76.4%	88.2%	

⁸ This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 34 is the number of times Chief Justice Shepard and Justice DeBruler agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES^h

		Shepard	DeBruler	Dickson	Sullivan	Selby	Boehm
Shepard, C.J.	O		57	104	91	102	43
	S		0	1	1	1	0
	D	---	57	105	92	103	43
	N		73	120	120	118	45
	P		78.0%	87.5%	76.6%	87.2%	95.5%
DeBruler, J.	O	57		57	54	55	
	S	0		0	5	0	
	D	57	---	57	59	55	---
	N	73		73	73	71	
	P	78.0%		78.0%	80.8%	77.4%	
Dickson, J.	O	104	57		92	104	44
	S	1	0		0	0	0
	D	105	57	---	92	104	44
	N	120	73		120	118	45
	P	87.5%	78.0%		76.6%	88.1%	97.7%
Sullivan, J.	O	91	54	92		91	37
	S	1	5	0		3	0
	D	92	59	92	---	94	37
	N	120	73	120		118	45
	P	76.6%	80.8%	76.6%		79.6%	82.2%
Selby, J.	O	102	55	104	91		41
	S	1	0	0	3		0
	D	103	55	104	94	---	41
	N	118	71	118	118		45
	P	87.2%	77.4%	88.1%	79.6%		91.1%
Boehm, J.	O	43		44	37	41	
	S	0		0	0	0	
	D	43	---	44	37	41	---
	N	45		45	45	45	
	P	95.5%		97.7%	82.2%	91.1%	

^h This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 57 is the total number of times Chief Justice Shepard and Justice DeBruler agreed in all full majority opinions written by the court in 1996. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C

UNANIMITY

NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASESⁱ

Unanimous ^j			Unanimous With Concurrence ^k			Opinions With Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
49	25	74(64.9%)	12	3	15(13.2%)	14	11	25(21.9%)	114

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percent of overall opinions with concurrence and overall opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court’s opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D

3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, C.J., Dickson, J., Selby, J.	4
2. Shepard, C.J., DeBruler, J., Dickson, J.	1
3. Shepard, C.J., Dickson, J., Boehm, J.	1
4. DeBruler, J., Dickson, J., Selby, J.	1
Total ⁿ	7

¹ This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

ⁿ The 1996 term's 3-2 decisions were:

1. Shepard, C.J., Dickson, J., Selby, J.: *Fassinger v. State*, 666 N.E.2d 58 (Ind. 1996) (Shepard, C.J.); *Brown v. State*, 667 N.E.2d 1115 (Ind. 1996) (Shepard, C.J.); *Schnitz v. State*, 666 N.E.2d 919 (Ind. 1996) (Shepard, C.J.); *David v. State*, 669 N.E.2d 390 (Ind. 1996) (Selby, J.)

2. Shepard, C.J., DeBruler, J., Dickson, J.: *A Woman's Choice-East Side Women's Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996) (Shepard, C.J.)

3. Shepard, C.J., Dickson, J., Boehm, J.: *Spurlock v. State*, 675 N.E.2d 312 (Ind. 1996) (Boehm, J.)

4. DeBruler, J., Dickson, J., Selby, J.: *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996) (DeBruler, J.)

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed or Vacated ^p	Affirmed	Total
Civil Appeals Accepted for Transfer	20 (74.1%)	7 (25.9%)	27
Direct Civil Appeals	7 (70.0%)	3 (30.0%)	10
Criminal Appeals Accepted for Transfer	13 (61.9%)	8 (38.1%)	21
Direct Criminal Appeals	10 (17.2%)	48 (82.8%)	58
Total	50 (43.1%)	66 (56.8%)	116 ^q

^o Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years. See IND. CONST. art. 7, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. See IND. APP. R. 4(A) and also pursuant to Rules of Procedure for Original Actions. All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. See IND. APP. R. 11(B). The court’s transfer docket, especially civil cases, has substantially increased in the past five years, but declined significantly last year. See Chief Justice Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

^p Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. See IND. APP. R. 11(B)(3). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^q This does not include 60 attorney and judicial discipline opinions; one writ of mandamus or prohibition; four opinions related to certified questions; nor six miscellaneous cases. These opinions did not reverse, vacate or affirm any other court’s decision.

TABLE E-2**DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 1996^r**

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^s	332 (91.2%)	32 (8.8%)	364
Criminal ^t	402 (95.0%)	21 (5.0%)	423
Juvenile ^u	19 (95.0%)	1 (5.0%)	20
Total	753 (93.3%)	54 (6.7%)	807

^r This Table analyzes the disposition of petitions to transfer by the court. See IND. APP. R. 11(B). This Table is compiled from information provided by the Indiana Supreme Court in a report entitled, "Grant and Denial of Cases in Which Transfer to the Indiana Supreme Court Has Been Sought."

^s This also includes petitions to transfer in tax cases and worker's compensation cases.

^t This also includes petitions to transfer in post-conviction relief cases.

^u This includes civil and criminal cases involving juveniles.

TABLE F

SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^v

Original Actions	Number
• Certified Questions	4 ^w
• Writs of Mandamus or Prohibition	1 ^x
• Attorney and Judicial Discipline	60 ^y
Criminal	
• Death Penalty	5 ^z
• Fourth Amendment or Search and Seizure	1 ^{aa}
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	1 ^{bb}
Trusts, Estates or Probate	1 ^{cc}
Real Estate or Real Property	4 ^{dd}
Landlord-Tenant	0
Divorce or Child Support	3 ^{ee}
Children in Need of Services (CHINS)	0
Paternity	2 ^{ff}
Product Liability or Strict Liability	1 ^{gg}
Negligence or Personal Injury	5 ^{hh}
Indiana Tort Claims Act	1 ⁱⁱ
Statute of Limitations or Statute of Repose	0
Tax, Department of State Revenue, or State Board of Tax Commissioners	4 ^{jj}
Contracts	7 ^{kk}
Corporate Law or the Indiana Business Corporation Law	1 ^{ll}
Uniform Commercial Code	0
Banking Law	0
Employment Law	4 ^{mm}
Environmental Law	4 ⁿⁿ
First Amendment, Open Door Law, or Public Records Law	0
Indiana Constitution	9 ^{oo}

^v This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 1996. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. A citation list is provided in a footnote for each area.

^w Shirley v. Russell, 663 N.E.2d 532 (Ind.1996); A Woman’s Choice-East Side Women’s Clinic v. Newman, 671 N.E.2d 104 (Ind. 1996); Citizens Nat’l Bank v. Foster, 668 N.E.2d 1236 (Ind. 1996); Cox v. Worker’s Compensation Bd., 675 N.E.2d 1053 (Ind. 1996).

^x In re Mandate of Funds in the Harrison Superior Court, 674 N.E.2d 555 (Ind. 1996).

^y *In re Vested*, 660 N.E.2d 1024 (Ind. 1996); *In re Sanders*, 674 N.E.2d 165 (Ind. 1996); *In re Bibbins*, 661 N.E.2d 825 (Ind. 1996); *In re Cohen*, 669 N.E.2d 986 (Ind. 1996); *In re Danks*, 669 N.E.2d 992 (Ind. 1996); *In re Colman*, 669 N.E.2d 1390 (Ind. 1996); *In re Kinney*, 670 N.E.2d 1294 (Ind. 1996); *In re Contempt of the Supreme Court*, 673 N.E.2d 755 (Ind. 1996); *In re Burton*, 674 N.E.2d 1319 (Ind. 1996); *In re Lahey*, 660 N.E.2d 1022 (Ind. 1996); *In re Thrasher*, 661 N.E.2d 546 (Ind. 1996); *In re Skozen*, 660 N.E.2d 1377 (Ind. 1996); *In re Kinkead*, 661 N.E.2d 823 (Ind. 1996); *In re Horine*, 661 N.E.2d 1206 (Ind. 1996); *In re Lekin*, 662 N.E.2d 185 (Ind. 1996); *In re Barratt*, 663 N.E.2d 536 (Ind. 1996); *In re Dinius*, 663 N.E.2d 770 (Ind. 1996); *In re Myers*, 663 N.E.2d 771 (Ind. 1996); *In re McBride*, 663 N.E.2d 775 (Ind. 1996); *In re Cushing*, 663 N.E.2d 776 (Ind. 1996); *In re Behrmann*, 664 N.E.2d 730 (Ind. 1996); *In re Comstock*, 664 N.E.2d 1165 (Ind. 1996); *In re Higginson*, 664 N.E.2d 732 (Ind. 1996); *In re Moore*, 665 N.E.2d 40 (Ind. 1996); *In re Stanton*, 664 N.E.2d 1175 (Ind. 1996); *In re Makin*, 664 N.E.2d 1175 (Ind. 1996); *In re Haecker*, 664 N.E.2d 1176 (Ind. 1996); *In re Sims*, 665 N.E.2d 584 (Ind. 1996); *In re Clifford*, 665 N.E.2d 907 (Ind. 1996); *In re Chavez*, 666 N.E.2d 399 (Ind. 1996); *In re Sexson*, 666 N.E.2d 402 (Ind. 1996); *In re Brown*, 669 N.E.2d 989 (Ind. 1996); *In re Kight*, 672 N.E.2d 411 (Ind. 1996); *In re Catt*, 672 N.E.2d 410 (Ind. 1996); *In re Redding*, 672 N.E.2d 76 (Ind. 1996); *In re Woolbert*, 672 N.E.2d 412 (Ind. 1996); *In re Wilson*, 672 N.E.2d 931 (Ind. 1996); *In re Lucas*, 672 N.E.2d 934 (Ind. 1996); *In re Jordan*, 673 N.E.2d 471 (Ind. 1996); *In re Stanley*, 673 N.E.2d 755 (Ind. 1996); *In re Toth*, 672 N.E.2d 1362 (Ind. 1996); *In re Whitesell*, 670 N.E.2d 890 (Ind. 1996); *In re Brodeur*, 674 N.E.2d 164 (Ind. 1996); *In re Maternowski*, 674 N.E.2d 1287 (Ind. 1996); *In re Martenet*, 674 N.E.2d 549 (Ind. 1996); *In re Grimm*, 674 N.E.2d 551 (Ind. 1996); *In re Maley*, 674 N.E.2d 544 (Ind. 1996); *In re Love*, 674 N.E.2d 547 (Ind. 1996); *In re Everitt*, 667 N.E.2d 183 (Ind. 1996); *In re Kristoff*, 667 N.E.2d 183 (Ind. 1996); *In re McCarthy*, 668 N.E.2d 256 (Ind. 1996); *In re Weir*, 668 N.E.2d 679 (Ind. 1996); *In re Pope*, 667 N.E.2d 1117 (Ind. 1996); *In re Nienaber*, 667 N.E.2d 751 (Ind. 1996); *In re McKinney*, 666 N.E.2d 919 (Ind. 1996); *In re Wray*, 666 N.E.2d 920 (Ind. 1996); *In re Newman*, 666 N.E.2d 1236 (Ind. 1996); *In re Woods*, 660 N.E.2d 340 (Ind. 1996); *In re Norman*, 659 N.E.2d 1046 (Ind. 1996).

^z *Holmes v. State*, 671 N.E.2d 841 (Ind. 1996), affirming (direct appeal); *Schiro v. State*, 669 N.E.2d 1357 (Ind. 1996), overruling (post conviction relief); *Williams v. State*, 669 N.E.2d 1372 (Ind. 1996), affirming (direct appeal); *Peterson v. State*, 674 N.E.2d 528 (Ind. 1996), affirming (direct appeal); *Lambert v. State*, 675 N.E.2d 1060 (Ind. 1996), affirming (petition for rehearing).

^{aa} *Peterson v. State*, 674 N.E.2d 528 (Ind. 1996).

^{bb} *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996).

^{cc} *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165 (Ind. 1996).

^{dd} *Town Bd. of Orland v. Greenfield Mills, Inc.*, 663 N.E.2d 523 (Ind. 1996); *American States Ins. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Wolvos v. Meyer*, 668 N.E.2d 671 (Ind. 1996); *Noblesville Redev. v. Noblesville Assoc. Ltd. Partnership*, 674 N.E.2d 558 (Ind. 1996).

^{ee} *Carmichael v. Siegel*, 670 N.E.2d 890 (Ind. 1996); *Voigt v. Voigt*, 670 N.E.2d 1271 (Ind. 1996); *Quillen v. Quillen*, 671 N.E.2d 98 (Ind. 1996).

^{ff} *Humbert v. Smith*, 664 N.E.2d 356 (Ind. 1996); *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996).

^{gg} *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165 (Ind. 1996).

^{hh} *Shirley v. Russell*, 663 N.E.2d 532 (Ind. 1996); *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248 (Ind. 1996); *Butler v. City of Indianapolis*, 668 N.E.2d 1227 (Ind. 1996); *Polick v. Indiana Dep't of Highways*, 668 N.E.2d 682 (Ind. 1996); *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167 (Ind. 1996).

ⁱⁱ *Polick v. Indiana Dep't of Highways*, 668 N.E.2d 682 (Ind. 1996).

^{jj} *Fassinger v. State*, 666 N.E.2d 58 (Ind. 1996); *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996); *State v. Sproles*, 672 N.E.2d 1353 (Ind. 1996); *Boehm v. Town of St. John*, 676 N.E.2d 318 (Ind. 1996).

^{kk} *American States Ins. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 665 N.E.2d 891 (Ind. 1996); *Wolvos v. Meyer*, 668 N.E.2d 671 (Ind. 1996); *Rider v. Rider*, 669 N.E.2d 160 (Ind. 1996); *Wior v. Anchor Indus., Inc.*, 669 N.E.2d 172 (Ind. 1996); *Noblesville Redev. Comm'n v. Noblesville Assoc. Ltd. Partnership*, 674 N.E.2d 558 (Ind. 1996); *OEC-Diasonics, Inc. v. Major*, 674 N.E.2d 1312 (Ind. 1996).

^{ll} *Continental Basketball Ass'n v. Ellenstein Enters., Inc.*, 669 N.E.2d 134 (Ind. 1996).

^{mm} *Howard v. Incorporated Town of N. Judson*, 661 N.E.2d 549 (Ind. 1996); *Indiana Civil Rights Comm'n v. Delaware County Circuit Court*, 668 N.E.2d 1219 (Ind. 1996); *Rynerson v. City of Franklin*, 669 N.E.2d 964 (Ind. 1996); *Wior v. Anchor Indus. Inc.*, 669 N.E.2d 172 (Ind. 1996).

ⁿⁿ *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 665 N.E.2d 891 (Ind. 1996); *Town Bd. of Orland v. Greenfield Mills, Inc.*, 663 N.E.2d 523 (Ind. 1996); *Peabody Coal Co. v. Indiana Dep't of Natural Resources*, 664 N.E.2d 1171 (Ind. 1996).

^{oo} *Howard v. Incorporated Town of N. Judson*, 661 N.E.2d 549 (Ind. 1996); *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996); *Rynerson v. City of Franklin*, 669 N.E.2d 964 (Ind. 1996); *Brown v. State*, 671 N.E.2d 401 (Ind. 1996); *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996); *Citizens Nat'l Bank of Evansville v. Foster*, 668 N.E.2d 1236 (Ind. 1996); *State v. Sproles*, 672 N.E.2d 1353 (Ind. 1996); *Boehm v. Town of St. John*, 675 N.E.2d 318 (Ind. 1996); *Bayh v. Indiana State Bldg. & Constr. Trades Council*, 674 N.E.2d 176 (Ind. 1996).

BANKRUPTCY IN THE SEVENTH CIRCUIT: 1996

DOUGLASS G. BSHKOFF*

INTRODUCTION

At least with regard to decisions involving bankruptcy issues, 1996¹ was a very uneventful year in the Seventh Circuit. Most opinions dealt with routine matters.² Therefore, this short survey discusses only five decisions.

I. THE AUTOMATIC STAY

The case, *In re Carousel International Corp.*,³ involved the unsuccessful attempt of a nondebtor to invoke the protection of the automatic stay. The asset involved was \$250,000 held by an escrow agent pending resolution of a controversy between Carousel (the debtor) and Carousel's shareholders. Creditors of the shareholders (not creditors of the debtor) obtained liens against the escrowed funds prior to the resolution of the controversy. Other creditors of the shareholders argued that these liens were void because they were obtained prior to the resolution of the debtor's claim to the escrowed funds, during a period when the automatic stay was in effect. The court rejected this argument. It reasoned that funds not belonging to the debtor were not part of the estate and thus not protected by the automatic stay.⁴

This is the correct result. However, there are other, and sounder, lines of reasoning which lead to the same result. The court could have decided that nondebtor co-owners of the escrowed funds had no standing to assert a violation of the automatic stay.⁵ Such a rationale would have eliminated the need to conclude that the stay does not protect nonownership claims to property, an arguably incorrect conclusion in certain circumstances.⁶ Because the dispute involved only nondebtors, the court could also have decided that the bankruptcy court had no jurisdiction to adjudicate this controversy. Such a holding would have been consistent with the Seventh Circuit's narrow view of the bankruptcy court's "related to" jurisdiction.⁷

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1. This survey covers cases decided between November 1, 1995, and October 31, 1996.

2. *In re Wabash Valley Power Ass'n, Inc.*, 72 F.3d 1305 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 389 (1996), involves cram-down of a plan for a not-for-profit entity, hardly a routine matter. In fact, it is so unusual that it is of more academic than practical interest.

3. 89 F.3d 359 (7th Cir. 1996).

4. *Id.* at 362.

5. *See Winters v. George Mason Bank*, 94 F.3d 130, 135 (4th Cir. 1996).

6. 11 U.S.C. § 362(a)(3) (1994) prohibits "any act to obtain possession property of the estate or of property from the estate . . ." (emphasis added). This language covers situations in which the debtor has only a possessory interest in an asset. *See* 3 COLLIER ON BANKRUPTCY ¶ 362.03[5] at 362-19 (Lawrence P. King et al. eds., 15th ed. rev. 1997).

7. *See In re Fedpak Sys., Inc.*, 80 F.3d 207, 213-215 (7th Cir. 1996).

II. POWERS OF AVOIDANCE

Section 547(c)⁸ protects certain preferential transfers from avoidance. Section 547(c)(2) is one of the most important protection provisions. It prevents avoidance when the alleged preferential transfer both is subjectively and objectively "ordinary." The past practices of both the parties (the subjective element) and the industry (the objective element) must be considered when making this determination. In the case, *In re Tolona Pizza*,⁹ decided by the Seventh Circuit several years ago, the court accepted a moderately relaxed standard of proof for establishing the industry practice. The party defending the transaction does not need to establish the precise contours of industry norms. Rather, it must only show that a challenged payment was "within the outer limits of normal industry practices."¹⁰

*In re Midway Airlines, Inc.*¹¹ demonstrates that *Tolona Pizza* did not eliminate the need to present evidence of objective industry practice. In *Midway* the creditor-transferee offered evidence of its relationship with Midway and other members of the industry to establish the objective, industry-wide standard of practice. The court decided that this was not sufficient. Even though the exact parameters of the industry practice need not be established, the transferee must provide "proof beyond solely what is normal between the debtor and the creditor."¹²

III. DISCHARGE POLICY

When first adopted, the current bankruptcy code made it very difficult for debtors to enter into enforceable reaffirmation agreements. Court approval was always required, and the standards for approval were very demanding. The situation changed in 1984 when statutory control over the reaffirmation process was relaxed.¹³ There is some evidence that the loosening of control occurred, in part at least, because Congress believed that § 362(a)(6)¹⁴ prohibits any creditor initiated discussions of reaffirmation.

The committee believes that the automatic stay provided under section 362 of the Bankruptcy Reform Act of 1978 has drastically reduced, if not eliminated, the abusive practices encountered under the pre-1978 bankruptcy law. Creditors can no longer independently contact debtors to encourage them to reaffirm debts because such contact is

8. 11 U.S.C. § 547(c) (1994).

9. 3 F.3d 1029 (7th Cir. 1993). See Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit*: 1993, 27 IND. L. REV. 761, 762-63 (1994).

10. *Tolona Pizza*, 3 F.3d at 1033.

11. 69 F.3d 792 (7th Cir. 1995).

12. *Id.* at 798

13. See ELIZABETH WARREN & JAY WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 323-24 (3d ed. 1996).

14. 11 U.S.C. § 362(a)(6) (1994).

prohibited by the code.

The proposals before the committee to remedy defects in the reaffirmation process would not alter the prohibitions on contact with the debtor. Therefore, the major protection provided under the code to prevent coercive reaffirmation remains intact. Reaffirmations obtained presently that are subsequently denied by a bankruptcy court are, in fact, truly voluntary reaffirmations.¹⁵

Nonetheless, the Seventh Circuit in the case, *In re Duke*¹⁶ recently endorsed the view that a creditor's noncoercive request for a reaffirmation does not violate § 362(a)(6).¹⁷ According to Judge Wood, "[t]here is no reason to believe that reaffirmation agreements inevitably disadvantage debtors, and thus that the automatic stay should be used to protect debtors against this type of creditor effort to collect a pre-petition debt."¹⁸

Not all would agree that reaffirmation requests are so benign.¹⁹ Nevertheless, we are in a period when creditor interests are more highly valued than debtor concerns. A retrenchment in many respects of debtor bankruptcy protection began shortly after the new code became effective and continues today. The *Duke* decision, although not admirable, is consistent with the spirit of the times.²⁰ To preserve a modicum of debtor protection, the validation of creditor-initiated reaffirmations should be limited to situations like the one in *Duke* where (1) the debtor is represented by counsel and (2) counsel is informed of the reaffirmation request. Communications directed only to the debtor²¹ or involving pressure tactics²² should still be found to violate § 362(a)(6).

IV. PROCEDURE

The legislation which introduced changes in reaffirmation practice also created a new structure and operating procedure for the post-*Marathon* court system.²³ Section 157(a)²⁴ permits the district court to refer bankruptcy litigation to bankruptcy judges. Section 157(d) then requires withdrawal of proceedings from

15. S. Rep. No. 98-65, at 10, 11 (1983).

16. 79 F.3d 43 (7th Cir. 1996).

17. *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 85 (3d Cir. 1988).

18. *Duke*, 79 F.3d at 45.

19. See Douglass G. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J. 549, 557-59 (1995); HENRY SOMMER & GARY KLEIN, CONSUMER BANKRUPTCY LAW AND PRACTICE § 8.8.1, at 149-50 (5th ed. 1996).

20. See Douglass G. Boshkoff, *Debtor Protection at the Close of the Twentieth Century*, 23 CAP. U. L. REV. 379, 393 (1994).

21. See *In re Flynn*, 143 B.R. 798, 802-03 (Bankr. D.R.I. 1992).

22. *In re Walker*, 194 B.R. 165, 169 (Bankr. E.D. Tenn. 1996).

23. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) had decided that the then existing bankruptcy court system was unconstitutional.

24. 11 U.S.C. § 157(a) (1994).

the bankruptcy judge when resolution of the dispute “requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.”²⁵ The rationale for this rule “can only be the subject of conjecture.”²⁶

Sensing the possibility that withdrawal motions may be employed to stall litigation, courts have narrowly construed § 157(d). *In re Vicars Insurance Agency, Inc.*,²⁷ the first opinion on withdrawal standards in this circuit, holds that “mandatory withdrawal is required only [w]hen [the] . . . issues require interpretation, as opposed to mere application, of the non-title 11 statute, or when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law.”²⁸

In *Vicars*, the non-title 11 law was RICO. Even though the court of appeals had not yet spoken on the issue presented, the court felt that there was enough guidance available in district court opinions. Therefore, withdrawal was not required.

V. CROSS-BORDER INSOLVENCY

Must cross-border insolvency disputes arise in the Southern District of New York. That fact alone should create interest in such litigation when it occurs in the Northern District of Indiana. Although *In re Rimsat, Ltd.*²⁹ will probably not receive much critical attention because it presents fairly mundane issues, readers of this survey will surely be interested in Judge Posner’s description of the debtor.

Rimsat had been formed in 1992 to provide satellite communications (using Russian equipment) to Tonga and other islands in the South Pacific. Most of its investors are Malaysian. It was incorporated in the Federation of St. Christopher and Nevis (also known as the Federation of Saint Kitts and Nevis), a Caribbean nation that belongs to the British Commonwealth. . . . Its principal place of business is in Fort Wayne, Indiana. Most of its financial assets are there, but its nonfinancial assets, principally leaseholds in satellites, have no terrestrial site.³⁰

Would a law professor dare to put such an implausible fact situation on a final exam?

25. 28 U.S.C. § 157(d) (1994).

26. 1 COLLIER, *supra* note 6, ¶ 3.01[e][iii], at 3-69.

27. 96 F.3d 949 (7th Cir. 1996).

28. *Id.* at 954.

29. 98 F.3d 956 (7th Cir. 1996).

30. *Id.* at 957.

JUDICIAL DEVELOPMENTS IN BUSINESS AND CONTRACT LAW

BRAD A. GALBRAITH*
TIMOTHY D. FREEMAN**

INTRODUCTION

Indiana's appellate courts provided several interesting decisions concerning close corporations, franchise law, partnership law, and contract law during the survey period. The following is a review of some of the most significant decisions affecting these areas of law.

I. CLOSE CORPORATIONS—DIRECT ACTION BY MINORITY SHAREHOLDER

On December 29, 1995, the Supreme Court of Indiana reversed a trial court decision holding that a direct action may not be maintained by a minority shareholder against a closely-held corporation and another shareholder, and adopted a new rule recognizing an exception to the general rule that shareholders must proceed by way of a derivative action.¹

A. *Factual Background*

Robert Barth (Robert), a minority shareholder of Barth Electric Co. brought suit individually against both the corporation and its president and majority shareholder, Michael G. Barth, Jr. (Michael) (collectively referred to as Defendants), alleging a breach of fiduciary duty.² Robert alleged that Michael had taken certain actions which had the effect of "substantially reducing the value of Plaintiff's shares of common stock" in the corporation.³ Robert specifically alleged that Michael had:

- 1) terminated Robert's employment with the corporation;
- 2) paid excessive salaries to himself and to members of his immediate family;
- 3) used corporate employees to perform services on his and his son's homes without compensating the corporation;
- 4) appropriated corporate funds for personal investments;
- 5) dramatically lowered dividend payments;

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** Associate, Riley Bennett & Egloff, Indianapolis. B.A., 1991, DePauw University; J.D., 1994, University of Tulsa College of Law.

1. Barth v. Barth, 659 N.E.2d 559 (Ind. 1995).

2. At the time litigation commenced, Michael Barth owned 51% of the shares of the corporation, and Robert Barth owned 29.8%. See *id.* at 560. A third individual, Barbara J. Neita, not a party to the lawsuit, owned the remaining shares. See Barth v. Barth, 651 N.E.2d 291, 292 (Ind. Ct. App. 1995), *vacated*, 659 N.E.2d 559 (Ind. 1995).

3. See Barth, 659 N.E.2d at 560.

- 6) refused Robert access to corporate records; and
- 7) barred Robert from the corporation's premises.⁴

Defendants moved to dismiss Robert's complaint for failure to state a claim upon which relief can be granted pursuant to Trial Rule 12(B)(6).⁵ Defendants argued that a shareholder's derivative action was required to redress Robert's claims and that an individual direct action could not be maintained.⁶ The trial court granted Defendants' motion to dismiss.⁷

B. The Court of Appeals' Decision

In reversing the trial court, the court of appeals acknowledged that the "well-established general rule" prohibits a shareholder from maintaining an action in the shareholder's own name, but found that, under the particular circumstances of this case, requiring a derivative action would "exalt form over substance."⁸ Robert could have satisfied the requirements for bringing a derivative action and none of the reasons underlying the general derivative action requirement were present. Thereafter, the Defendants sought transfer to the Indiana Supreme Court.

C. The Supreme Court's Decision

The Indiana Supreme Court sided with the court of appeals. In doing so, the supreme court reviewed Judge Ratliff's discussion of the general rule in *Moll v. South Central Solar Systems, Inc.*⁹

The rationale supporting this rule is based on sound public policy considerations. It is recognized that authorization of shareholder actions in such cases would constitute authorization of multitudinous litigation and disregard for the corporate entity. Sound policy considerations have been said to require that a single action be brought rather than to permit separate suits by each shareholder even when the corporation and the shareholder are the same.¹⁰

As further support for the general rule, the supreme court cited *W & W Equipment Co. v. Mink*,¹¹ in which Judge Baker provided the following additional justifications:

- [1] the protection of corporate creditors by putting the proceeds of the

4. *Barth*, 651 N.E.2d at 292. Claim (1) was not on appeal. Only claims (2) through (5) were considered by the Indiana Supreme Court.

5. *Barth*, 659 N.E.2d at 560.

6. *Id.* Derivative actions are governed by Trial Rule 23.1 and IND. CODE §§ 23-1-32-1 (1993). See *Barth*, 659 N.E.2d at 560 n.3.

7. *Barth*, 659 N.E.2d at 560.

8. *Barth*, 651 N.E.2d at 292-93.

9. 419 N.E.2d 154. See *Barth*, 659 N.E.2d at 561.

10. *Barth*, 659 N.E.2d at 561 (citations omitted) (quoting *Moll*, 419 N.E.2d at 161).

11. 568 N.E.2d 564 (Ind. Ct. App. 1991).

recovery back in the corporation;

[2] the protection of the interests of all the shareholders rather than allowing one shareholder to prejudice the interests of other shareholders; and

[3] the adequate compensation of the injured shareholder by increasing the value of the shares when recovery is put back into the corporation.¹²

In validating the general rule requiring a shareholder to bring a derivative rather than a direct action when seeking redress for injury to the corporation, the supreme court acknowledged two reasons why the general rule will not always apply in the case of a closely-held corporation.¹³ First, the shareholders of a closely-held corporation “stand in a fiduciary relationship to each other, and as such, must deal fairly, honestly, and openly with the corporation and with their fellow shareholders.”¹⁴ In describing this fiduciary relationship, the supreme court cited a leading decision by the Supreme Judicial Court of Massachusetts:

Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the “utmost good faith and loyalty.” Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.¹⁵

The second reason that the general rule will not always apply is that shareholder litigation involving the closely-held corporation “will often not implicate the policies that mandate requiring derivative litigation when more widely-held corporations are involved.”¹⁶ In expanding upon this second reason, the supreme court cited the court of appeals’ decision in *W & W Equipment Co.*

12. *Id.* at 571 (citing *Caswell v. Jordan*, 362 S.E.2d 769 (Ga. Ct. App. 1987)). See *Barth*, 659 N.E.2d at 561.

13. “A closely-held corporation is one which typically has relatively few shareholders and whose shares are not generally traded in the securities market.” *Barth*, 659 N.E.2d at 561 n.5 (citing *W & W Equipment Co.*, 568 N.E.2d at 570).

14. *Id.* at 561 (citing *W & W Equip. Co.*, 568 N.E.2d at 570; *Krukemeier v. Krukemeier Mach. & Tool Co.*, 551 N.E.2d 885 (Ind. Ct. App. 1990); *Garbe v. Excel Mold, Inc.*, 397 N.E.2d 296 (Ind. App. 1979)).

15. *Id.* at 561 n.6 (citing *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 515 (Mass. 1975)).

16. *Id.* at 561.

v. *Mink*.¹⁷ In *Mink*, one of two fifty percent shareholders of a corporation had filed suit when the other shareholder joined with non-shareholder directors to fire the plaintiff and arrange for the payment of corporate assets to the other shareholder. The court of appeals found that there was no useful purpose in requiring the plaintiff to proceed through a derivative action where the policies favoring such an action were not implicated; direct corporate recovery was not necessary to protect absent shareholders or creditors as none existed.¹⁸

After studying the rationale behind the general rule, the supreme court adopted its new rule from section 7.01(d) of the American Law Institute's *Principles of Corporate Governance*, which states:

In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.¹⁹

The Indiana Supreme Court also determined that the discretion to decide whether a plaintiff must proceed by direct or by derivative action lies with the trial court.²⁰ In support of its determination, the court made the following observations, consistent with the comment to section 7.01(d) of the American Law Institute's *Principles of Corporate Governance*. First, allowing a direct action will exempt a plaintiff from the requirements of sections 23-1-32-1 to -5 of the Indiana Code, "including the provisions that permit a special committee of the board of directors to recommend dismissal of the lawsuit."²¹ Thus, in making its decision, the trial court should consider whether the corporation has a disinterested board that should be permitted to consider the impact upon the corporation caused by the litigation.²² Second, there may be some benefit to the corporation by permitting the plaintiff to proceed with a direct action in that the defendant would be allowed to file a counterclaim against the plaintiff, whereas counterclaims are generally prohibited in derivative litigation.²³ Finally, in a direct action, each side will normally be responsible for its own litigation expenses; therefore, even a successful plaintiff may not be able to look to the corporation for its attorney fees.²⁴

17. 568 N.E.2d 564. See *Barth*, 659 N.E.2d at 561.

18. *Mink*, 568 N.E.2d at 571.

19. See *Barth*, 659 N.E.2d at 562.

20. *Id.*

21. *Id.*; see IND. CODE § 23-1-32-4 (1993).

22. See *Barth*, 659 N.E.2d at 562-63 (citing CORPORATE GOVERNANCE PROJECT § 7.01 cmt. e) (1979)).

23. See *id.* at 563.

24. See *id.*

D. Conclusion

In *Barth*, the Indiana Supreme Court adopted section 7.01(d) of the American Law Institute's *Principles of Corporate Governance*, establishing an exception to the general rule that a shareholder must bring a derivative action to redress injury to the corporation when the litigation involves a closely-held corporation.²⁵

II. CONTRACTS—FRANCHISE LAW

On June 20, 1996, the Indiana Supreme Court construed the Indiana Franchise Act's²⁶ disclosure provisions as creating a private right of action only for acts that constitute fraud, deceit, or misrepresentation.²⁷ The court also emphasized the strong presumption of enforceability of contracts that are the result of freely bargained agreements between the parties and declared that a contract alleged to violate the Indiana Franchise Act²⁸ ("Disclosure Act") or the Indiana Deceptive Franchise Practices Act²⁹ (collectively the "Franchise Acts") must be closely analyzed to determine whether it is void.

A. Factual Background

In 1984, Ellenstein Enterprises, Inc. (Ellenstein) entered into a contract with the Continental Basketball Association (CBA) for the purchase of a professional basketball team "franchise" that would compete against other CBA franchises.³⁰ The agreement itself was entitled "Franchise Purchase Offer"³¹ and it provided that Ellenstein could use the CBA logo and marketing system and that Ellenstein would comply with the CBA by-laws, Operations Manual, and other CBA rules and regulations.³²

The dispute before the court concerned whether Ellenstein should be entitled to recover damages due to the CBA's alleged "fail[ure] to comply with the disclosure requirements imposed by the" Disclosure Act, among other claims.³³ Additionally, the CBA sought amounts due from Ellenstein under the agreement. The CBA pursued an interlocutory appeal after the trial court ruled "(i) that Ellenstein's purchase of a CBA franchise was subject to the Franchise Acts, thereby permitting Ellenstein's Disclosure . . . Claim[] to go forward; and (ii) that because the CBA had not complied with the Franchise Acts, the CBA could not enforce the franchise agreement against Ellenstein."³⁴ The Indiana Court of

25. *Id.* at 560.

26. IND. CODE §§ 23-2-2.5-1 to -51 (1993).

27. *Continental Basketball Ass'n v. Ellenstein Enters., Inc.*, 669 N.E.2d 134 (Ind. 1996).

28. IND. CODE §§ 23-2-2.5-1 to -51.

29. *Id.* §§ 23-2-2.7-1 to -7.

30. *Continental Basketball Ass'n*, 669 N.E.2d at 135-36.

31. *Id.* at 135.

32. *Id.* at 136.

33. *Id.* (alteration in original) (quoting Ellenstein from an unidentified pleading).

34. *Id.*

Appeals affirmed the trial court's rulings.³⁵

B. Definition Of Franchise

The Disclosure Act provides that a "franchise" is a "contract by which:

- (1) a franchisee is granted the right to engage in the business of dispensing goods or services, under a marketing plan or system prescribed in substantial part by a franchisor;
- (2) the operation of the franchisee's business pursuant to such a plan is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and
- (3) the person granted the right to engage in this business is required to pay a franchise fee.³⁶

Because "Ellenstein bought the right to operate a team in the league, entitling it to an equal share of the revenue generated by the league,"³⁷ he agreed to abide by the various CBA rules and regulations,³⁸ he obtained the right to associate its team with the CBA,³⁹ and the team "would be substantially associated with CBA's service mark, trade name, and advertising,"⁴⁰ the court of appeals determined that the trial court had properly concluded that the agreement was subject to the Franchise Acts. Additionally, the supreme court noted that "the CBA entitled the contract a 'Franchise Purchase Offer.'"⁴¹ Accordingly, the supreme court held that the contract was in fact a franchise agreement subject to the Franchise Acts.⁴²

C. No Private Right Of Action For Violation Of Disclosure Act

In a recent case,⁴³ the Seventh Circuit predicted that the Indiana Supreme Court, if confronted with the question of whether the Disclosure Act provides a private right of action for violating the Act's disclosure provisions, would agree with prior rulings of the Indiana Court of Appeals, holding that the Disclosure Act "creates a private right of action only for acts which constitute fraud, deceit or misrepresentation."⁴⁴

The Seventh Circuit's prediction was correct and the supreme court held that "[a] private right of action 'arises for failure to comply with the [Disclosure Act]

35. *Continental Basketball Ass'n v. Ellenstein Enters., Inc.*, 640 N.E.2d 705, 712 (Ind. Ct. App. 1994), *adopted in part*, 669 N.E.2d 134 (Ind. 1996).

36. IND. CODE § 23-2-2.5-1(a) (1993).

37. *Continental Basketball Ass'n*, 640 N.E.2d at 708.

38. *Id.*

39. *Id.*

40. *Id.* at 708-09.

41. *Continental Basketball Ass'n v. Ellenstein Enters.*, 669 N.E.2d 134, 137 (Ind. 1996).

42. *Id.*

43. *Hardee's, Inc. v. Hardee's Food Sys., Inc.*, 31 F.3d 573, 577 (7th Cir. 1994).

44. *Continental Basketball Ass'n*, 669 N.E.2d at 137.

only upon allegations of facts which would support an inference of fraud, deceit, or misrepresentation.”⁴⁵ “[E]nforcement authority conferred on private parties is limited to combatting violations of the anti-fraud provision of the Disclosure Act, which paraphrases Rule 10b-5 under the Securities Exchange Act of 1934.”⁴⁶

D. Franchise Agreement Not Void For Violating Franchise Acts

Both the trial court and the Indiana Court of Appeals held that the franchise agreement was void and that the CBA could not recover amounts due from Ellenstein under the agreement because the CBA failed to comply with the registration and disclosure requirements of the Disclosure Act. The Indiana Supreme Court disagreed, citing its recent decision in *Fresh Cut, Inc. v. Fazli*,⁴⁷ where the court emphasized its strong presumption that “contracts that represent the freely bargained agreement of the parties” are enforceable.⁴⁸ However, the court acknowledged that “courts have refused to enforce private agreements on public policy grounds in three types of situations: (i) agreements that contravene statute; (ii) agreements that clearly tend to injure the public in some way; and (iii) agreements that are otherwise contrary to the declared public policy of Indiana.”⁴⁹ When an agreement falls into the third category, as did the agreement involved in *Fresh Cut*,⁵⁰ the proper method for determining enforceability is a balancing test. The factors to be considered when using such a balancing test are: “(i) the nature of the subject matter of the contract; (ii) the strength of the public policy underlying the statute; (iii) the likelihood that refusal to enforce the bargain or term will further that policy; (iv) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (v) the parties’ relative bargaining power and freedom to contract.”⁵¹

In analyzing the facts of this case, the court emphasized that where a contract “actually contravenes a statute, the court’s responsibility is to declare the contract void rather than apply the balancing test.”⁵² “But crucial to that determination is deciding whether a contract actually contravenes [a] statute.”⁵³ In making such determination, the court stated that it “will not find that a contract contravenes a statute unless the language of the implicated statute is clear and unambiguous that the legislature intended that the courts not be available for either party to enforce

45. *Id.* (alteration in original) (quoting *Moll v. South Cent. Solar Sys.*, 419 N.E.2d 154, 162 (Ind. Ct. App. 1981)).

46. *Id.* (citing 17 C.F.R. § 240.10b-5 (1995)).

47. 650 N.E.2d 1126 (Ind. 1995).

48. *Continental Basketball Ass’n*, 669 N.E.2d at 139.

49. *Id.*

50. *Fresh Cut*, 650 N.E.2d at 1130.

51. *Continental Basketball Ass’n*, 669 N.E.2d at 140 n.9 (citing *Fresh Cut*, 650 N.E.2d at 1130).

52. *Id.* at 140.

53. *Id.*

a bargain made in violation thereof.”⁵⁴

In the instant case, the Franchise Acts fail to use the words “void” or “unenforceable” and, in fact, include remedial provisions. Thus, the court concluded that “the legislature did not intend that every contract made in violation of the Franchise Acts be void,” but instead, the balancing approach from *Fresh Cut* should be applied.⁵⁵ Having applied those factors to the case at bar, the court concluded that there is “no compelling argument to declare the contract void,” and that the agreement was not void as against public policy.⁵⁶

E. Conclusion

In *Continental Basketball Ass’n*, the court confirmed the Indiana Court of Appeals and Seventh Circuit prediction that the Indiana Franchise Act provides no private right of action for violation of its disclosure provisions except when circumstances indicate fraud, deceit or misrepresentation. Additionally, the court applied its recently enunciated balancing test to determine whether public policy requires that a contract in violation of the Franchise Acts be declared void as against public policy and concluded that, under the factual circumstances of *Continental Basketball Ass’n*, the contract was not void.

III. PARTNERSHIPS—ATTORNEY-CLIENT RELATIONSHIP

On August 6, 1996, the Indiana Supreme Court published two opinions concerning the extent of the attorney-client relationship when an attorney represents a partnership.⁵⁷ Although these decisions do not fit squarely within the parameters of this Article, they are decisions with which all attorneys who represent partnerships should be familiar.

In *Rice v. Strunk*,⁵⁸ the court held that an attorney who represents a general partnership subject to the Uniform Partnership Act⁵⁹ “has an attorney-client relationship with each of both the partnership and each individual partner. However, to the extent that the partners agree that the partnership will be managed in a form other than by all the partners acting in aggregate, the attorney-client relationship will run to the partnership as an entity acting through its duly authorized management.”⁶⁰

In a companion case decided the same day as *Rice v. Strunk*, the supreme court addressed the attorney-client relationship in the context of a limited partnership situation. In *Bell v. Clark*,⁶¹ the court stated that as a matter of limited partnership

54. *Id.*

55. *Id.*

56. *Id.* at 141.

57. *Rice v. Strunk*, 670 N.E.2d 1280 (Ind. 1996); *Bell v. Clark*, 670 N.E.2d 1290 (Ind. 1996).

58. 670 N.E.2d 1280 (Ind. 1996).

59. IND. CODE §§ 23-4-1-1 to -43 (1993 & Supp. 1996)

60. *Rice*, 670 N.E.2d at 1288-89.

61. 670 N.E.2d 1290 (Ind. 1996).

law, the general partner in a limited partnership is responsible for the management of the partnership.⁶² Thus, “[a]pplying the principles set forth in *Rice*,” the court concluded that, in a limited partnership situation, “an attorney-client relationship [exists] only between the attorney[] and the partnership and not between the attorney[] and any individual partner.”⁶³

In light of these decisions, attorneys should review any written partnership agreement prior to accepting employment as an attorney for a partnership so that the identity of the persons to whom the attorney-client relationship extends and the scope of the attorney’s duties can be determined.

IV. CONSTRUCTION CONTRACTS—MECHANIC’S LIENS

On January 31, 1996, in *Riddle v. Newton Crane Service, Inc.*,⁶⁴ the Indiana Court of Appeals reversed the decision of a trial court and applied a narrow construction to Indiana’s mechanic’s lien statute.⁶⁵

A. Factual Background

Harold Riddle entered into a contract with Citadel Contracting (Citadel) for the construction of a truck service center.⁶⁶ On July 9, 1993, Citadel entered into a subcontract with Blue Jay Erectors for the placement of concrete wall panels. Thereafter, Blue Jay subcontracted with Newton Crane Service (Newton) for Newton to provide crane service to lift the concrete wall panels into place for Blue Jay.⁶⁷ On October 1, 1993, Newton moved a crane onto the job site. Using the crane, Newton performed work on the job site from October 4, 1993 through October 8, 1993.⁶⁸ The crane was then removed from the job site on October 12, 1993. On October 28, 1993, Newton moved a second crane onto the job site in order to lift wall panels on that date.⁶⁹ The second crane was removed from the job site on November 6, 1993.⁷⁰

On January 3, 1994, Newton recorded its sworn statement and notice of intention to hold mechanic’s lien against Riddle’s real estate in the Marion County Recorder’s office.⁷¹ The lien asserted a claim for \$12,420.89 and described the work done on Riddle’s property as “crane service.”⁷² Newton later filed a Complaint to Foreclose Mechanic’s Lien, and in response, Riddle filed

62. *Id.* at 1293 (citing IND. CODE § 23-16-5-3 (1993)).

63. *Id.*

64. 661 N.E.2d 6 (Ind. Ct. App. 1996), *trans. denied*.

65. *Id.*

66. *Id.* at 8.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

counterclaims alleging slander of title and abuse of process.⁷³ Following a bench trial, judgment was entered in favor of Newton on both Newton's Complaint and on Riddle's counterclaims. The trial court made special findings of fact and conclusions of law pursuant to Riddle's motion under Trial Rule 52(A).⁷⁴

Neither party disputed the trial court's findings that Newton worked on Riddle's property from October 4, 1993 through October 8, 1993, and removed the first crane on October 12, 1993.⁷⁵ The parties also did not dispute the trial court's findings that Newton used the second crane only on October 28, 1993 and removed it from the job site on November 6, 1993.⁷⁶ Riddle, however, challenged the trial court's finding that the last date that Newton provided labor and equipment under its contract was November 6, 1993, and the trial court's conclusion that Newton had timely filed its sworn statement and notice of intention to hold mechanic's lien within sixty days of completing the work.⁷⁷ Accordingly, Riddle appealed the trial court's decision, and the dispositive issue presented to the court of appeals was: at what point is a contractor's work complete so as to trigger the sixty-day period for recording a notice of intent to hold a mechanic's lien?⁷⁸

B. The Decision

According to Indiana's mechanic's lien statute, a notice of intention to hold mechanic's lien must be filed by the claimant with the county Recorder within sixty days after performing labor or furnishing materials or machinery.⁷⁹ Newton recorded its sworn statement and notice of intention to hold mechanic's lien with the Marion County Recorder on January 3, 1994,⁸⁰ fifty-eight days after Newton removed the second crane from the job site, but sixty-seven days after Newton completed lifting wall panels.⁸¹

As indicated by the court of appeals, the Indiana statute governing filing of a notice of intention to hold mechanic's lien is in derogation of the common law and its provisions must be strictly construed.⁸² Accordingly, the filing of the notice of intention to hold mechanic's lien by a subcontractor is timely only if the lien is filed within sixty days of the date when the last work was done by the subcontractor.⁸³ Importantly, "[t]he 60-day period may not be extended through

73. *Id.*

74. *Id.* at 7-8.

75. *Id.* at 8.

76. *Id.*

77. *Id.*

78. *Id.* at 7-8.

79. IND. CODE. § 32-8-3-3(a) (1993).

80. *Riddle*, 661 N.E.2d at 8.

81. *Id.*

82. *Id.* (citing *Wavetek Ind., Inc. v. K. H. Gatewood Steel Co.*, 458 N.E.2d 265 (Ind. Ct. App. 1984)).

83. *Id.* at 8-9 (citing *McCorry v. G. Cowser Const., Inc.*, 636 N.E.2d 1273, (Ind. Ct. App.),

the performance of an act incidental to the contract.”⁸⁴ Thus, the resolution of this case depends on whether removal of the second crane from the job site is considered work by Newton or considered incidental to the work performed by Newton.

Because there was no Indiana authority directly on point, the court of appeals considered similar decisions by the Michigan Court of Appeals in *Superior Steel Systems, Inc. v. Nature's Nuggets, Inc.*⁸⁵ and *Blackwell v. Bornstein*.⁸⁶ In *Blackwell*, a subcontractor returned to a job site at which he had previously worked to pick up his tools. He later claimed that the act of picking up his tools was the last work done at the site causing the period for filing a mechanic's lien to commence.⁸⁷ The Michigan Court of Appeals determined that collecting the tools was “sufficiently related to the labor and materials supplied by the subcontractor because it was an integral part of the work the subcontractor had done.”⁸⁸

However, in *Superior Steel*, the Michigan Court of Appeals reached a different conclusion. In *Superior Steel*, a subcontractor returned to a job site to pick up a concrete compactor almost one year after completing his work on the site.⁸⁹ The Michigan Court of Appeals preserved its holding in *Blackwell*, but ruled that the removal of equipment from a job site nearly one year after completing the work “was not an integral part of the work involved.”⁹⁰ The court further stated that to hold otherwise “would lead to absurd results, such as a contractor leaving a tool box or other minor piece of equipment for years after ceasing work and being able to file a timely construction lien.”⁹¹

In contrast to Michigan's liberal construction, Indiana's mechanic's lien statutes are to be narrowly construed because lien rights are in derogation of the common law.⁹² Using a narrow construction, the Indiana Court of Appeals held that Newton's notice of intention to hold mechanic's lien was not timely filed.⁹³ According to Indiana's mechanic's lien statute, “a subcontractor commences work at a job site not when it moves its equipment to the location, but when it actually begins performing the task for which it was hired.”⁹⁴ Therefore, the court of appeals held that “a subcontractor completes its work, and the 60-day period for filing a notice of intention to hold mechanic's lien commences, when the

adopted, 644 N.E.2d 550 (Ind. 1994)).

84. *Id.* at 9 (citing *Gooch v. Hiatt*, 337 N.E.2d 585, 588 (Ind. App. 1975)).

85. 435 N.W.2d 492 (Mich. App. 1989).

86. 299 N.W.2d 397 (Mich. App. 1980).

87. *Riddle*, 661 N.E.2d at 9 (citing *Blackwell*, 299 N.W.2d at 399).

88. *Id.*

89. *Id.* (citing *Superior Steel*, 435 N.E.2d at 494).

90. *Id.*

91. *Id.* (quoting *Superior Steel*, 435 N.E.2d at 494).

92. *Id.* (citing *Premier Invs. v. Suites of Am.*, 644 N.E.2d 124, 127 (Ind. 1994)).

93. *Id.*

94. *Id.* (citing *Ramsey v. Peoples Trust & Sav. Bank*, 264 N.E.2d 111 (Ind. App. 1970)).

subcontractor finishes the task for which it was hired.”⁹⁵

Applying the court’s holding to the facts in *Riddle*, the sixty-day filing period commenced when Newton completed lifting the concrete wall into place on October 28, 1993.⁹⁶ Because Newton did not file its notice of intention to hold mechanic’s lien until January 3, 1994, sixty-seven days after completing its work, Newton’s mechanic’s lien was not timely filed.⁹⁷ As such, Newton was precluded, as a matter of law, from foreclosing on its mechanic’s lien.

C. Conclusion

Indiana subcontractors were previously somewhat unclear about the tasks that qualify as work for purposes of commencing the sixty-day period for filing mechanic’s liens. In *Riddle*, the court of appeals construed Indiana’s mechanic’s lien statute narrowly and made clear the court’s view that the sixty-day period begins on the date the subcontractor finishes the task for which it was hired.

95. *Id.* at 9-10.

96. *Id.* at 10.

97. *Id.*

STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

ROSALIE BERGER LEVINSON*

INTRODUCTION

These materials explore state and federal constitutional law developments over the past year. The first part of this survey examines state constitutional law cases, and the remaining materials focus on state and federal court cases that raise significant and recurring federal constitutional issues.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

A. *Parallel State Provisions Given Independent Significance*

Several years ago Chief Justice Randall T. Shepard invited Indiana practitioners to reexamine the state constitution as a potential source for the protection of civil liberties.¹ Even where provisions in Indiana's Bill of Rights parallel those found in the federal Constitution, a different legal analysis may be used. In recent years the Indiana Supreme Court has recognized and applied this principle. For example, in *Moran v. State*,² the Indiana Supreme Court ruled that article I, section 11 of the Indiana Constitution,³ which protects against unreasonable searches and seizures, requires a different analysis than that used under the Fourth Amendment.⁴ Although the latter focuses on reasonable expectations of privacy, the court ruled that section 11 requires the inquiry be solely on the reasonableness of the officer's conduct.⁵ This new analysis might still yield the same result—in *Moran*, the court held warrantless search of curbside trash was not an unreasonable search under the state constitution, thus reaching the same conclusion that the U.S. Supreme Court did under the Fourth Amendment.⁶

Another example of the court giving independent significance to a state provision involves article I, section 23, the state "Equal Privileges and

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1. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

2. 644 N.E.2d 536 (Ind. 1994).

3.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

IND. CONST. art. I, § 11.

4. *Moran*, 644 N.E.2d at 539-40 (comparing equivalent language in the Fourth Amendment).

5. *Id.* at 539.

6. *Id.* at 541 (quoting *California v. Greenwood*, 486 U.S. 35, 40 (1988)).

Immunities" clause.⁷ The texts are not identical: section 23 may be described as an "anti-preference" clause, whereas the Equal Protection Clause is an "anti-discrimination" provision.⁸ Nonetheless, state and federal courts in Indiana had for a number of years interpreted the provisions as coterminous.⁹ In *Collins v. Day*,¹⁰ the Indiana Supreme Court rejected this trend and ruled that federal equal protection analysis does not apply to article I, section 23. Looking to the text of the provision, the intent of the framers, as well as early decisions interpreting this section, the court rejected federal analysis and its emphasis on suspect classes and fundamental rights.¹¹ Instead, the Indiana Supreme Court found that the principal purpose of this anti-preference clause was to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity, in particular to private, commercial enterprises.¹² Article I, section 23 requires that statutes that grant unequal privileges or immunities to differing classes of persons meet the following standard:

1. The disparate treatment must be "reasonably related to inherent characteristics which distinguish the unequally treated classes"; and
2. "The preferential treatment must be uniformly applicable and equally available to all persons similarly situated."¹³

The court emphasized, however, that substantial deference must be given to the legislative judgment, which should be invalidated "only where the lines drawn appear arbitrary or manifestly unreasonable."¹⁴ Applying this analysis, the court sustained the state law that excluded agricultural employers from worker's

7. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 23.

8. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

9. *Reed v. United States*, 604 F. Supp. 1253, 1264 (N.D. Ind. 1984) (same standard of review for Fourteenth Amendment and article I, section 23); *Reilly v. Robertson*, 360 N.E.2d 171, 175 (Ind. 1977) (article I, section 23 intended to protect rights identical to those found in the Fourteenth Amendment's Equal Protection Clause); *Haas v. South Bend Community Sch. Corp.*, 289 N.E.2d 495, 500 (Ind. 1972) (Because rights intended to be protected under both constitutional provisions are identical, a violation of the Fourteenth Amendment necessarily is a violation of article I, section 23.).

10. 644 N.E.2d 72 (Ind. 1994).

11. *Id.* at 75.

12. *Id.* at 77.

13. *Id.* at 80. This standard is derived from earlier Indiana cases that applied rational basis scrutiny but also required that differences used to classify be inherent, substantial, germane to the subject and purpose of the legislative classification, and that such schemes include all within the class. *Bolivar Township Bd. of Fin. v. Hawkins*, 191 N.E. 158, 163 (Ind. 1934); *School of Elwood v. State ex rel. Griffin*, 180 N.E. 471, 474 (Ind. 1932), *overruled on other grounds by* *McQuaid v. State ex rel. Sigler*, 6 N.E.2d 547 (Ind. 1937).

14. *Collins*, 644 N.E.2d at 80.

compensation coverage¹⁵ because the plaintiff failed to carry his burden "to negative every reasonable basis for the classification."¹⁶

This past year several Indiana litigants sought to invoke article I, section 23 to invalidate state initiatives ranging from Indiana High School Athletic Association rules to Indiana's Medical Malpractice Act.¹⁷ The requirement that disparate treatment be related to "inherent characteristics which distinguish the unequally treated classes"¹⁸ might suggest some closer scrutiny than that applied under low-level rational basis analysis required by the federal Equal Protection Clause. However, the court's emphasis on deferring to the legislative judgment and its mandate that the plaintiff "negative every reasonable basis for the classification"¹⁹ indicates that this independent analysis will not afford much greater protection to victims of alleged unfair classification schemes. Most appellate court decisions this past term support this conclusion.

For example, in *Indiana High School Athletic Ass'n v. Reyes*,²⁰ the Indiana Court of Appeals held that an IHSAA rule restricting participation in interscholastic sports to eight semesters met the *Collins* test.²¹ Reyes sought to play baseball despite the fact that he was in his ninth semester, having been forced to repeat the ninth grade because of psychological problems and poor grades at the Academia Del Espiritu Santo in Puerto Rico.²² The IHSAA Executive Committee denied his request for an extra year of eligibility, finding that granting this request would be contrary to the goal of placing academics first and athletics second and that Reyes could not show that enforcement of the rule would cause an "undue hardship."²³ The court overruled the trial court's finding that refusing Reyes an extra year of eligibility was arbitrary and capricious.²⁴ It also found that the Eight-Semester Rule did not violate article I, section 23, and it sustained the "hardship" exception for those who have suffered an injury, illness or accident, finding that the exception was reasonably related to an inherent characteristic, i.e., lack of opportunity to participate based upon disabling circumstances.²⁵ In addition, the rule was uniformly applicable and equally available to all persons similarly situated.²⁶ Although Reyes did not appeal the decision, the school corporation, which faced forfeiture of all baseball games for the "tainted" season, filed a petition to transfer regarding this forfeiture rule.²⁷

15. IND. CODE § 22-3-2-9(a) (1993).

16. *Collins*, 644 N.E.2d at 81.

17. See *infra* notes 18-54 and accompanying discussion.

18. *Collins*, 644 N.E.2d at 80.

19. *Id.* at 81.

20. 659 N.E.2d 158 (Ind. Ct. App. 1995), *trans. granted*, (Ind. May 15, 1996).

21. *Id.* at 168-69.

22. *Id.* at 160.

23. *Id.* at 161.

24. *Id.* at 164.

25. *Id.* at 168-69.

26. *Id.*

27. *Id.* at 169-70.

Similarly, in *Indiana High School Athletic Ass'n v. Avant*,²⁸ the appellate court sustained an association transfer rule, whereby students who transfer to member schools with a change of residence by their parents have immediate full varsity eligibility at the new school, while students who transfer without a corresponding move by their parents are ineligible for varsity membership for 365 days following the transfer unless the student qualifies under a listed exception.²⁹ The court ruled that the distinctions between the classifications were reasonably related to achieving the Association's purpose in deterring school jumping and recruitment and that the rule applied equally to all persons similarly situated.³⁰ The rule allowed a "hardship" exception when strict enforcement of the provision would not violate the spirit of the rule, and Avant's parents claimed the transfer from private to public school was financially, not athletically motivated. However, the IHSAA found that the parents could not meet the second requirement—that enforcement of the rule would cause undue hardship—because there was no change in the family's circumstances.³¹

Ironically, a different panel of the court of appeals held that this same transfer rule violates the purportedly less demanding federal equal protection standard. In *Indiana High School Athletic Ass'n v. Carlberg*,³² the court relied on an earlier Indiana Supreme Court decision, *Sturup v. Mahan*,³³ in which the court held that the transfer rule was "unconstitutionally overbroad" in violation of the Fourteenth Amendment.³⁴ Although the court noted that the *Sturup* analysis was "out of the mainstream of case law on federal equal protection analysis" in that laws may not be invalidated due to overbreadth under traditional federal equal protection scrutiny, the court felt bound to follow this earlier ruling of the Indiana Supreme Court.³⁵ The plaintiff in *Avant* had simply failed to raise this federal claim.³⁶ Because the Indiana Supreme Court has ruled that classification schemes are presumed valid, and that laws may not be condemned for being somewhat under- or over-inclusive, provided they are appropriate as applied to the general subject matter upon which they are intended to operate,³⁷ this overbreadth

28. 650 N.E.2d 1164 (Ind. Ct. App. 1995), *trans. denied*.

29. *Id.* at 1170.

30. *Id.*

31. *Id.* at 1168-69. This aspect of the rule appears harsh—provided a move is not athletically motivated, why should a student have to meet the additional "hardship" exception, particularly where such requires a significant "change in financial condition"? *See id.* at 1170. Obviously the concern is that parents not be permitted to thinly disguise athletically motivated transfers, but the strictly worded exceptions may exclude students whose parents simply decide to no longer pay private tuition.

32. 661 N.E.2d 833 (Ind. Ct. App. 1996), *trans. granted*, No. 29S05-9610-CV-681 (Ind. Oct. 24, 1996).

33. 305 N.E.2d 877 (Ind. 1974).

34. *Carlberg*, 661 N.E.2d at 834.

35. *Id.*

36. *Id.* at 834 n.2.

37. *Collins*, 644 N.E.2d at 80. Although underinclusive laws would appear to more directly

argument would be to no avail under state constitutional standards.

A few months after the ruling in *Carlberg*, a federal district court addressed the constitutionality of the transfer rule. Because federal courts, unlike state courts, are not bound by erroneous Indiana Supreme Court interpretations of federal equal protection doctrine, the court in *Robbins v. Indiana High School Athletic Ass'n*³⁸ rejected *Sturru* and upheld the validity of the high school transfer rule.³⁹ It explicitly noted that “federal equal protection ‘rational basis’ analysis does not contain an ‘overbroad’ component.”⁴⁰ In this case, Robbins had transferred from public school to a parochial school, and thus was subject to the IHSA Transfer Rule, which prevented her from participating as a member of the varsity volleyball team during her first semester because the transfer was not accompanied by a move on the part of her parents. Although the district court conceded that the rule “catches some non-athletically motivated transfers into the net constructed to stop only athletically motivated transfers,” it held that under traditional rational basis analysis the regulations must be sustained.⁴¹ Further, it rejected the notion that the rule burdened Robbins’ or her parents’ First Amendment right to the free exercise of their religion because the rule on its face did not classify in terms of religion, and there was no evidence in the record that it unduly trammelled their religious beliefs.⁴² Although recognizing the purported unfairness of the rule in this context, the court concluded that change should “occur through the IHSA rule promulgation procedure and not by court fiat.”⁴³

In *Person v. State*,⁴⁴ the court sustained a special statutory classification of minors that prohibits them from possessing handguns, and that subjects violators to a mandatory five-day jail term.⁴⁵ Again, the court reasoned that the class was clearly defined, the classification was reasonably related to the subject and purpose of the law, and the statutory scheme applied uniformly to all persons under age eighteen.⁴⁶ The court emphasized that classifications are primarily a legislative

violate the requirement that the privilege be equally available to all, the *Collins* court, citing earlier state decisions, stated that “Exact exclusion and inclusion is impractical” and that legislatures shouldn’t be required to “provide for every exceptional and imaginary case” in order to survive a constitutional challenge. *Id.*

38. 941 F. Supp. 786 (S.D. Ind. 1996).

39. *Id.* at 793.

40. *Id.*

41. *Id.* at 792-93. *Cf. Romer v. Evans*, 116 S. Ct. 1620, 1632 (1996) (Scalia, J., dissenting) (quoting *Beller v. Middendorf*, 632 F.2d 788, 808-09 (9th Cir. 1980) (pointing out that although a law may be irrational as applied in certain cases, it does not make that law unconstitutional).

42. *Robbins*, 941 F. Supp. at 792. Because the rule did not cause “grave interference with important religious tenets” nor did it require the parents to act contrary to the fundamental tenets of their belief, strict scrutiny was not required. *Id.*

43. *Id.* at 794.

44. 661 N.E.2d 587 (Ind. Ct. App. 1996), *trans. denied*.

45. *Id.* at 593-94. *See* IND. CODE §§ 35-47-10-5, -8 (Supp. 1996).

46. *Person*, 661 N.E.2d at 593. *See also Gambill v. State*, 675 N.E.2d 668 (Ind. 1996) (verdict option of guilty but mentally ill is reasonably related to the inherent characteristic shared

question and that they “become a judicial question only where lines drawn appear arbitrary or manifestly unreasonable.”⁴⁷

In light of this highly deferential approach, it is unlikely that *Collins* will revolutionize equal protection law in Indiana. There are currently pending, however, attempts to utilize section 23 to challenge the constitutionality of a provision of Indiana’s Medical Malpractice Act,⁴⁸ which requires minors to file claims by their eighth birthday or two years after the incident, whichever is later.⁴⁹ Because during the first round of litigation the constitutional claims were rejected using Fourteenth Amendment analysis, the cases were remanded, although one appellate panel cautioned that on remand the burden remains on the plaintiff to “negative every reasonable basis for the [challenged] classification.”⁵⁰ In the meantime, two panels of the court of appeals have ruled that the general occurrence-based malpractice statute of limitations violates section 23 to the extent it bars a claim before the individual knows it exists or would reasonably be

by all in the class, namely mental illness, and because it is a pathway to treatment which is uniformly applicable and equally available to all persons found guilty but mentally ill, it does not deny equal protection under art. I, § 23); *Greer v. State*, 669 N.E.2d 751 (Ind. Ct. App. 1996) (statute denying good time credit for probationers given home detention, while granting it to those on home detention awaiting trial is rationally related to unique nature of probation, which is a conditional liberty, as compared to those who have not yet been convicted of a crime), *trans. granted*, No. 57S03-9610-CR-953 (Ind. Oct. 15, 1996).

47. *Person*, 661 N.E.2d at 593. See also *American Legion Post No. 113 v. State*, 656 N.E.2d 1190, 1193 (Ind. Ct. App. 1995), *trans. denied*. In *American Legion Post*, the court evaluated statutes which prohibited gambling except for riverboat, parimutuel, and participation in state-operated lottery. See IND. CODE §§ 35-45-5-2 to -5 (1993 & Supp. 1996). The court determined that the riverboat and parimutuel wagering exceptions do not create unlawful classifications of individuals who may participate in those forms of gambling. *American Legion Post*, 656 N.E.2d at 1193. The court found that although the operation of lotteries is limited to the State Lottery Commission, this privilege was justified because the State Lottery Commission is “uniquely situated to regulate and control gambling activities.” *Id.* In the case, *In re Train Collision at Gary*, 654 N.E.2d 1137, 1146-47 (Ind. Ct. App. 1995), *trans. denied*, the court evaluated whether treating a commuter transportation district as a political subdivision, violated article I, section 23. See IND. CODE §§ 34-4-16.5-2(b)(2), -20(a)(2) (Supp. 1992) (codified as amended at IND. CODE § 34-4-16.5-2(b)(2) (Supp. 1996); *id.* § 8-5-15-2 (1993)). In concluding that it did not, the court determined that despite the limitation of recovery based on the plaintiff’s statutes as interstate travelers on a commuter railway, the regulation was rationally related to the legislative purpose of preserving operation of interstate commuter railways. *Train Collision*, 654 N.E.2d at 1146-47. The regulation did so by preserving the financial condition of counties served by the railways. *Id.* Moreover, the limitations applied “equally and uniformly to all persons injured while passengers . . .” *Id.* at 1147.

48. IND. CODE § 27-12-7-1 (1993).

49. *Ledbetter v. Hunter*, 652 N.E.2d 543 (Ind. Ct. App. 1995); *Cundiff v. Daviess County Hosp.*, 656 N.E.2d 298 (Ind. Ct. App. 1995), *trans. denied*.

50. *Ledbetter*, 652 N.E.2d at 550 (quoting *Collins v. Day*, 644 N.E.2d 72, 81 (Ind. 1994)); *accord Cundiff*, 656 N.E.2d at 302.

expected to discover its existence. In *Martin v. Richey*,⁵¹ the court held that medical malpractice victims are clearly treated differently inasmuch as other tort victims enjoy a discovery-based statute of limitations, thus implicitly granting them a special privilege or immunity.⁵² Although conceding that the law is “reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs,”⁵³ it failed *Collins*’ requirement that the law apply equally to all persons who share the same inherent characteristics.⁵⁴ Because this is the first time a classification scheme has been invalidated under the new *Collins* test, the Indiana Supreme Court will likely have the final say.

Another area in which the Indiana Supreme Court has charted a different course from federal constitutional analysis in interpreting a parallel state provision involves free speech rights under article I, section 9, of the Indiana Constitution, which broadly guarantees free expression, but also provides that speakers may be held accountable “for abuse of that right.”⁵⁵ Three years ago, in *Price v. State*,⁵⁶ the court held that political speech is a “core value”⁵⁷ and that the state cannot punish political speech, even in the context of resisting arrest, unless the political speech inflicts harm upon others “analogous to that which would sustain tort liability against the speaker.”⁵⁸ In essence no “abuse” can be found unless the political speech causes private harm. Although Price’s conduct in shouting profanities protesting the officer’s arrest may have created a public nuisance, it did not rise above the level of a “fleeting annoyance” to the residents who were the alleged victims of her tirade, and thus the state could not punish her for her words.⁵⁹ The case was significant because it meant that even if Price’s speech would be deemed unprotected “fighting words” under the First Amendment, her conviction still had to be overturned because of the state guarantee.⁶⁰ Further, unlike First Amendment analysis, the court clarified that under article I, section 9

51. 674 N.E.2d 1015 (Ind. Ct. App. 1997); *Harris v. Raymond*, 680 N.E.2d 551 (Ind. Ct. App. 1997). But see *Johnson v. Lupta*, No. 64A03-9611-CV-401, 1997 WL 403702 (Ind. Ct. App. July 21, 1997) (disagreeing with *Martin*).

52. *Martin*, 674 N.E.2d at 1022.

53. *Id.*

54. *Id.* at 1023. The court further held that this occurrence-based statute of limitations violates article I, section 12 which guarantees that courts be open to redress injury to person, property and reputation. *Id.* at 1023-27. Although noting that challenges under section 12 have been rejected in the past, it carefully traced the history and intervening scholarship and concluded that in light of the large number of plaintiffs left without a remedy, section 12 required that a discovery-based statute of limitation apply equally to all tort victims. *Id.* at 1027.

55. “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.” IND. CONST. art. I, § 9.

56. 622 N.E.2d 954 (Ind. 1993).

57. *Id.* at 963.

58. *Id.* at 964.

59. *Id.*

60. *Id.* at 964-65.

courts are not to weigh the burden on speech against the government interest: “‘Material burden’ analysis involves no such weighing nor is it influenced by the social utility of the state action at issue. Instead, we look only at the magnitude of the impairment.”⁶¹ In short, the state may not materially burden political speech, a core constitutional value, unless it proves that the expression has specifically harmed other individuals.

Subsequent appellate court opinions, however, have emphasized the unique fact situation in *Price* where the forum was a residential alley at 3 a.m. after a New Year’s Eve party where a large group of “quarreling party-goers” had congregated.⁶² It was in this pandemonium setting that *Price*’s comments could be characterized as a mere “fleeting annoyance.”⁶³ In each new context the court must decide when speech becomes sufficiently intrusive of the rights of others so as to constitute an unprotected private, not merely a public, nuisance. For example, in *Hooks v. State*,⁶⁴ the court reasoned that even if *Hooks*’ speech was protected under the constitution because “it was aimed at protesting the actions of police rather than hindering or obstructing police duties or investigations,”⁶⁵ the conviction must nonetheless be affirmed because the State presented evidence that *Hooks*’ screaming was heard by neighbors: “The jury could reasonably conclude from this evidence that *Hooks*’ speech infringed upon the peace and tranquility of others.”⁶⁶ In dissent, Judge Robertson argued that the verbal protest occurred on a city street and “[t]he magnitude of the infringement upon the peace and tranquility of others could not have surpassed the ‘fleeting annoyance’ described in *Price*.”⁶⁷ In most situations speech which triggers an arrest for disturbing the peace will be considered more than “a fleeting annoyance,” *Price* may therefore be relegated to its very unique fact pattern. Unfortunately, the Indiana Supreme Court denied transfer in *Hooks* and thus it remains uncertain as to when speech will be viewed as inflicting “harm of a gravity analogous to that required under tort law.”⁶⁸

The importance of context, as well as content, is discussed, however, in the Indiana Supreme Court’s most recent decision analyzing article I, section 9, *Whittington v. State*.⁶⁹ The court began its analysis by noting that the context of *Whittington*’s conduct was significantly different from that in *Price* in that the “expression” occurred inside a private apartment.⁷⁰ The conflict arose during police investigation of a domestic incident where *Whittington* had punched his pregnant sister in the stomach, and the facts demonstrated that his loud outburst

61. *Id.* at 960 n.7.

62. *Id.* at 956.

63. *Id.* at 964.

64. 660 N.E.2d 1076 (Ind. Ct. App. 1996), *trans. denied*.

65. *Id.* at 1077.

66. *Id.*

67. *Id.* at 1078 (Robertson, J., dissenting).

68. *Price*, 622 N.E.2d at 964.

69. 669 N.E.2d 1363 (Ind. 1996).

70. *Id.* at 1367.

agitated other persons in the apartment, interrupted the officer's investigation, and aggravated the sister's trauma.⁷¹ However, the court ultimately did not base its decision on this different context, but instead determined that Whittington failed to meet his initial burden of establishing that the content of his speech was political in nature.⁷²

The court reiterated the governing principle—if political speech is not implicated, the state may sanction the speech provided it reasonably concludes that the expression was an “abuse” within the meaning of article I, section 9.⁷³ In contrast, where the expressive activity is political, the state must demonstrate that its action does not materially burden the opportunity to engage in this type of valued expression: “[P]ure political expression cannot be said to constitute an ‘abuse’ within the police power unless it ‘inflicts upon determinable parties harm of a gravity analogous to that required under tort law.’”⁷⁴

The core question in *Whittington* was whether the expressive activity could be defined as political. The court provided the following definition:

Expressive activity is political, for the purposes of the responsibility clause,^[75] if its point is to comment on government action, whether applauding an old policy or proposing a new one, or opposing a candidate for office or criticizing the conduct of an official acting under color of law. The judicial quest is for some express or clearly implied reference to governmental action.⁷⁶

In short, an individual's expression that merely focuses on the person's own conduct or that of another private party will not be deemed political speech. Because Colleen Price was protesting police treatment of another citizen when the office warned her to be quiet, she fell within the rubric of political expression.⁷⁷ The court emphasized that the burden of proof is on the claimant to demonstrate that the expression would have been understood as political.⁷⁸ Further, “[i]f the expression, viewed in context, is ambiguous, a reviewing court should find that the claimant has not established that it was political and should evaluate the

71. *Id.* at 1366.

72. *Id.* at 1370. The defendant must prove the expressive activity is political and then the burden shifts to the State to demonstrate its action did not materially burden that speech. *See id.* at 1369.

73. *Id.*

74. *Id.* at 1369-70 (quoting *Price v. State*, 622 N.E.2d 954, 964 (Ind. 1993)).

75. IND. CONST. art. I, § 9. The responsibility clause limits the right to free speech by a person's responsibility for the abuse of that right.

76. *Whittington*, 669 N.E.2d at 1370 (footnote omitted).

77. *Id.* *See also* *Radford v. State*, 640 N.E.2d 90, 94 (Ind. Ct. App. 1994), *trans. denied* (for speech to be considered “purely political” it must be directed to persuade, not to evade the performance of a legal duty by a police officer); *Stites v. State*, 627 N.E.2d 1343, 1344 (Ind. Ct. App. 1994) (because speaker was concerned with perpetuating a disagreement with a former boyfriend and not protesting police conduct, her speech was unprotected).

78. *Whittington*, 669 N.E.2d at 1370.

constitutionality of any state-imposed restriction of the expression under standard rationality review.”⁷⁹

Applying this analysis to the facts in *Whittington*, the court summarily concluded that the defendant’s “expression was not political.”⁸⁰ *Whittington* directed his frustration at his sister’s boyfriend who he thought had called the police, and he in fact testified that his remarks were not directed toward the officer.⁸¹ As a result, the rationality standard applied and *Whittington*’s speech was an unprotected “abuse of the right to speak” both because of its volume and because it threatened peace, safety, and well-being.⁸²

Two justices, concurring in the judgment in *Whittington*, expressed concern with the court’s “all or nothing” approach to article I, section 9. Whereas protection for political speech is “enshrined” in article I, section 9, other forms of speech receive negligible protection under a rational basis analysis.⁸³ Although the majority can be commended for defining the meaning of “political expression,” the decision leaves unanswered difficult questions as to what state interests will be sufficient to justify interference with this valued expression.⁸⁴

B. Provisions Unique to the State Constitution

In addition to the numerous provisions in the Indiana constitution that parallel federal guarantees, there are several unique provisions in the state constitution that triggered significant litigation this past year. Perhaps the most noteworthy case was *Town of St. John v. State Board of Tax Commissioners*,⁸⁵ wherein the Indiana Tax Court ruled that the state’s method of real property taxation violates the uniformity provision of the state constitution:⁸⁶ “The General Assembly shall

79. *Id.* The court commented further that even where the plaintiff meets this burden, the state may still defeat the claim by demonstrating either that the state action does not impose a material burden on expression or that the expression “threatens to inflict ‘particularized harm’ analogous to tortious injury.” *Id.* Although the *Whittington* court used “threatens to inflict” language, the *Price* court spoke of speech which *actually* inflicts harm that would sustain tort liability. *Price*, 622 N.E.2d at 964.

80. *Whittington*, 669 N.E.2d at 1370.

81. *Id.* at 1370-71.

82. *Id.* at 1371.

83. *Id.* at 1371-72 (Sullivan, J., concurring); *id.* at 1371-72 (Dickson, J., dissenting, concurring in result). Justice Dickson notes the confusion the *Price* framework has created in the lower courts, e.g., in *Radford v. State*, 627 N.E.2d 1331 (Ind. Ct. App. 1994), the court initially overturned the conviction, and then, on rehearing and after a change in court personnel, reversed itself and affirmed the conviction. *Radford v. State*, 640 N.E.2d 90 (Ind. Ct. App. 1994), *trans. denied*. See also *Whittington*, 669 N.E.2d at 1371 (Sullivan, J., concurring).

84. For example, it leaves open the question of whether injury to government’s ability to carry out its administrative or policymaking functions would be harm analogous to tortious injury. *Whittington*, 669 N.E.2d at 1370 n.10.

85. 665 N.E.2d 965 (Ind. T.C.), *rev’d sub nom.* 675 N.E.2d 318 (Ind. 1996).

86. *Id.* at 974.

provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal.”⁸⁷

In interpreting this provision, the court carefully examined the history surrounding its drafting and ratification as well as judicial decisions contemporaneous with its adoption.⁸⁸ It concluded that the term “just value” must mean market value.⁸⁹ Thus, the State Board of Tax Commissioners’ use of “true tax value system”⁹⁰ of real property taxation, which is unrelated to market value, violated the state constitution’s uniformity requirement.⁹¹ The decision was to be applied prospectively only, and the Indiana Legislature and the State Board were given until March 1, 1998 to bring the state’s system of real property taxation into compliance with the constitution.⁹²

The Indiana Supreme Court reversed the tax court decision, holding the tax system was constitutional, and vacated the deadline to the legislature.⁹³ Applying its own lengthy analysis of precedent and history, the court concluded “a system based solely upon strict fair market value is not expressly required by either the text of the constitution, by the purpose of its framers, or by subsequent case law.”⁹⁴ The court added, “The Indiana Constitution requires that our property tax system achieve substantially uniform and equal rates of property assessment and taxation and authorizes the legislature to allow a variety of methods to secure just valuation.”⁹⁵

Another provision invoked by Indiana litigants this past year was article IV, section 22,⁹⁶ which prohibits the general assembly from passing local or special laws, and article IV, section 23,⁹⁷ which provides that all laws must be “general, and of uniform operation throughout the State.” In *Indiana Gaming Commission v. Moseley*,⁹⁸ the Indiana Supreme Court emphasized that although the framers expressed a preference for general laws, at the same time they recognized that in many situations special laws may be necessary and that courts must grant a “high

87. IND. CONST. art. X, § 1(a).

88. *Town of St. John*, 665 N.E.2d at 968-74.

89. *Id.* at 972.

90. See IND. ADMIN. CODE tit. 50, r. 2.1-2-1, *repealed by* State Board of Tax Commissioners, effective March 1, 1995; *id.* tit. 50, r. 2.2-1-8 (1996).

91. *Town of St. John*, 665 N.E.2d at 974.

92. *Id.*

93. *Boehm v. Town of St. John*, 675 N.E.2d 318, 327 (Ind. 1996).

94. *Id.*

95. *Id.*

96. There are 16 subject matters for which legislative authority is restricted including crimes, misdemeanors, court practices, divorce, regulating county and township business, and tax assessment. IND. CONST. art. IV, § 22.

97. “In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.” *Id.* § 23.

98. 643 N.E.2d 296 (Ind. 1994).

degree of deference to the legislature on Section 23 questions.”⁹⁹ Thus, it sustained the riverboat gambling statute¹⁰⁰ that allowed for a countywide vote in favor of riverboat gambling rather than a citywide vote depending upon the number of inhabitants in the area.¹⁰¹ The court of appeals ruled the population restrictions were reasonable and article IV had not been violated.¹⁰²

In the case, *In re Train Collision at Gary*,¹⁰³ the court explained that the fact that only one governmental unit presently qualifies under a statute¹⁰⁴ that was apparently drafted with that single unit in mind does not render the statute unconstitutional provided “the terms of the statute permit other units to eventually qualify.”¹⁰⁵ Because interstate railway commuter transportation does not lend itself to a uniform law of general applicability, but must be limited to geographical areas where residents travel on a daily basis from one state to another for employment, the Commuter Transportation Districts Act¹⁰⁶ does not violate the prohibition against special laws, despite the fact that it singles out certain counties.¹⁰⁷

Finally, two decisions addressed the state constitutional mandate found in article IX that the general assembly provide support for institutions that assist the deaf, the mute, the blind, the insane, as well as for institutions for the correction and reformation of juvenile offenders.¹⁰⁸ In *Y.A. v. Bayh*,¹⁰⁹ the court held that this article does not impose a mandatory duty to provide psychiatric residential treatment facilities for all emotionally disturbed children because the constitutional provision does not require unlimited, but rather only adequate care.¹¹⁰ Even though only 400 of some 7000 children needing residential care were receiving it,¹¹¹ the court reasoned that it could not order the legislature to maintain a particular care level or to raise funding adequate for providing all members of a class with limitless support:

[T]he constitutional provision is not without limitations. These limitations may be imposed by common sense, and by the constraints

99. *Id.* at 300.

100. IND. CODE §§ 4-33-6-18 to -20 (1993 & Supp. 1996).

101. *Moseley*, 643 N.E.2d at 305.

102. *Id.*

103. 654 N.E.2d 1137 (Ind. Ct. App. 1995), *trans. denied*.

104. IND. CODE §§ 8-5-15-1 to -2 (Supp. 1996).

105. *Train Collision*, 654 N.E.2d at 1141.

106. IND. CODE § 8-5-15-1.

107. *Train Collision*, 654 N.E.2d at 1142.

108. “It shall be the duty of the General Assembly to provide, by law, for the support of institutions for the education of the deaf, the mute, and the blind; and for the treatment of the insane.” IND. CONST. art. IX, § 1. “The General Assembly shall provide institutions for the correction and reformation of juvenile offenders.” *Id.* § 2.

109. 657 N.E.2d 410 (Ind. Ct. App. 1995), *trans. denied*.

110. *Id.* at 417-18.

111. *Id.* at 413.

placed upon government to wisely distribute and apportion available funds among the various needs and programs which exist and which must be established for the welfare of all citizens. In short, the constitutional provisions are to be construed in the light of reason and the logical intendment of the framers.¹¹²

Although the general assembly may not avoid the constitutional mandate by refusing to raise and appropriate adequate funds to provide care, the court held that it had satisfied its constitutional duty: “[W]e are not at liberty to fashion a degree of care for a particular segment of the class, nor are we able to direct the General Assembly to raise funds adequate for the executive to care for all members of the class in an unlimited fashion.”¹¹³

In a similar vein, an Indiana appellate court ruled, in *Logansport State Hospital v. W.S.*,¹¹⁴ that the trial court violated separation of powers when it ordered a facility to hire additional staff because it did not want to commit a patient to a facility that it viewed as woefully understaffed and unable to provide minimal care.¹¹⁵ The court invoked article III, section 1, of the Indiana Constitution,¹¹⁶ which mandates a three-part system of government and forbids one governmental branch from encroaching upon the responsibilities of another branch.¹¹⁷ Because article IX, section 1, specifically makes it the duty of the General Assembly to provide for mental health institutions, the trial court “overstepped its authority” by ordering the institution to hire more medical staff.¹¹⁸

112. *Id.* at 417.

113. *Id.* at 417-18 (the relevant statutory provisions are: IND. CODE §§ 12-21-1-1 to -3, 12-21-5-2, 12-21-2-3(a)(10), 12-21-2-3(4), 12-22-3-2, 12-22-3-4(5) (1993 & Supp. 1996)).

114. 655 N.E.2d 588 (Ind. Ct. App. 1995).

115. *Id.* at 590.

116. “The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.” IND. CONST. art. III, § 1.

117. *Logansport*, 588 N.E.2d at 589-90.

118. 655 N.E.2d at 590. *Cf.* *Williams v. State*, 669 N.E.2d 1372, 1377 (Ind. 1996) (although judge may intervene in the factfinding process and question witnesses in order to promote clarity or dispel obscurity . . . to the extent trial court’s intervention in proceeding constitutes exercising prosecutorial function, it violates constitutional separation of powers mandated by article III, section 1), *cert. denied*, 117 S. Ct. 1828 (1997); *Platt v. State*, 664 N.E.2d 357, 366-67 (Ind. Ct. App. 1996), *trans. denied* (allowing the city-county council and the mayor to make appointments to serve on a Public Defender Board does not commingle powers of the three branches contrary to article III, section 1, nor is the effect of the ordinance to usurp judicial power), *and cert. denied*, 118 S. Ct. 1470 (1997).

II. FEDERAL CONSTITUTIONAL LAW

A. *Procedural Due Process*

In deciding whether procedural due process rights have been violated, the U.S. Supreme Court applies a two-pronged analysis, requiring that a plaintiff initially identify a property or liberty interest, and, assuming this burden is met, balancing the competing interests to determine whether sufficient procedural safeguards have been afforded.¹¹⁹

1. *Identification of Protected Interest.*—As to the first part of the analysis, state or local law or custom often dictates whether a property or liberty interest has been created. Generally, under state law, government workers are considered to be at-will employees, and attempts to establish property rights through “unwritten common law” or policy manuals have been unsuccessful. In *Lashbrook v. Oerkfitz*,¹²⁰ the Seventh Circuit explained that for a policy manual to create an enforceable right, its terms must be mandatory and not permissive.¹²¹ Because of a prominent disclaimer displayed on the first page of the manual, statements could not have created a reasonable belief that an offer of employment was being made.¹²²

Similarly, in *Warzon v. Drew*,¹²³ the Seventh Circuit held that a paragraph in a Wisconsin employment contract providing that the employee was subject to termination upon ninety days written notice did not establish a constitutionally protected property right because it placed no substantive restrictions on the county’s authority to terminate, and merely provided for ninety days notice.¹²⁴

On the other hand, it is well-established that if the government defames an individual in connection with a termination even from an at-will job, deprivation

119. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (ruling applies to the Fifth Amendment Due Process Clause. “Nor shall any person . . . be deprived of Life, Liberty or Property without due process of law . . .” Identical language appears in the Fourteenth Amendment.).

120. 65 F.3d 1339 (7th Cir. 1995).

121. *Id.* at 1347.

122. *Id.*

123. 60 F.3d 1234 (7th Cir. 1995).

124. *Id.* at 1240. *See also* *Flynn v. Kornwolf*, 83 F.3d 924, 927 (7th Cir.), *cert. denied*, 117 S. Ct. 301 (1996) (Although court order appointing former bailiffs as court attendants set forth an expiration date for their positions, it placed no substantive restriction on the government’s authority to terminate, and, thus, order did not create a property interest that would trigger due process protection; under Wisconsin law unless there is a civil service regulation or statute or contract or collective bargaining agreement, a public employee remains an employee at will.); *Border v. City of Crystal Lake*, 75 F.3d 270 (7th Cir. 1996) (City employee failed to establish enforceable implied employment contract based on a handbook, where such did not contain a promise of continuing employment and in fact contained a clear disclaimer, *id.* at 274-75, provision containing grievance procedures did not create property interest since such did not indicate “for cause” employment nor did it include termination procedures. *Id.* at 276).

of a federally protected liberty interest is implicated.¹²⁵ Recent Seventh Circuit decisions emphasize, however, that the damage to reputation must be severe in order to trigger federal procedural safeguards. For example, in *Lashbrook v. Oerkfitz*,¹²⁶ the court held that in order to infringe on an employee's liberty interest, "the circumstances of the termination must make it virtually impossible for the employee to find new employment in that field [and] the government must have actually participated in disseminating the [defamatory] information to the public."¹²⁷ In *Lashbrook*, the park district's public announcement of a firing, even if it suggested incompetence, was insufficient to impinge on a federally protected liberty interest.¹²⁸ Further, the fact that the park district requested the employee to vacate his office and turn in his keys did not suggest the type of stigmatizing information that triggered federal due process protection.¹²⁹

2. *What Process Is Due.*—Once a protected property or liberty interest is identified, the necessary procedural safeguards are determined by balancing (a) the private interest affected; (b) the risk of erroneous deprivation and the value of additional procedural safeguards; and (c) the government's interests.¹³⁰ Many litigants have lost their procedural due process claims under this analysis. For example, in *Cliff v. Indiana Department of State Revenue*,¹³¹ the Indiana Supreme Court ruled that the procedures afforded by the controlled substance excise tax law, which permits the Department of State Revenue to immediately seize property after assessment, did not violate procedural due process because the law granted review in a meaningful time and manner in an area where "the magnitude of the government's need to take action without administrative delay justifies the temporary deprivation of property."¹³² The court emphasized that a full and fair opportunity to challenge the assessment was available post-deprivation, and that the taxpayer could also block collection efforts by seeking injunctive relief.¹³³ Similarly, in *Mitchell v. State*,¹³⁴ the court sustained the procedure used to suspend

125. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). *See also* *McMath v. City of Gary*, 976 F.2d 1026, 1031-1032 (7th Cir. 1992) (complaint alleging that defendants discharged employee in conjunction with publicly communicated false statements regarding alleged criminal activity properly sets out a violation of plaintiff's clearly established right to a name-clearing hearing).

126. 65 F.3d 1339 (7th Cir. 1995).

127. *Id.* at 1348-49.

128. *Id.* at 1349.

129. *Id.* *See also* *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985) ("Liberty is not infringed by a label of incompetence or a failure to meet a specific level of management skills, which would only affect one's professional life and force one down a few notches in the professional hierarchy. A liberty interest is not implicated when the charges merely result in reduced economic returns and diminished prestige, but not permanent exclusion from or protracted interruption of employment.").

130. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

131. 660 N.E.2d 310 (Ind. 1995).

132. *Id.* at 318 (ruling on IND. CODE §§ 6-7-3-13 and 6-8.1-5-3 (1993)).

133. *Id.* (as applied to IND. CODE §§ 6-8.1-5-1 and 33-3-5-11 (1993)).

134. 659 N.E.2d 112 (Ind. 1995).

a driver's license of a defendant convicted of possession of cocaine.¹³⁵ The court reasoned that because the deprivation occurred after lawful conviction and a full sentencing hearing, there was no procedural due process violation.¹³⁶

In the area of educational due process, the Indiana Court of Appeals in *Reilly v. Daly*,¹³⁷ rejected the claims of a medical student who was dismissed after she failed a course because professors determined she had cheated on an examination.¹³⁸ The court explained that in an academic dismissal, due process requires only the barest procedural protections, but that where dismissal is for disciplinary reasons, the fundamental requirements are notice and an opportunity for a hearing appropriate to the nature of the case.¹³⁹ Without characterizing Reilly's dismissal as academic or disciplinary, the court rejected all of her claims of alleged procedural deficiencies. Reilly's due process rights were not violated when she was denied the opportunity to cross-examine the professors.¹⁴⁰ Further, she was not entitled to be judged by a clear and convincing rather than a substantial evidence standard of proof.¹⁴¹ In school suspension and dismissal cases, due process does not require "an elaborate hearing before a neutral party, but simply 'an informal give-and-take between student and disciplinarian' which gives the student an 'opportunity to explain his version of the facts.'"¹⁴² Here, Reilly was fully apprised of the evidence against her and had an opportunity to present her side of the story.¹⁴³ The evaluation form sent to her after the examination fully set forth the professors' reasons for believing she had cheated

135. *Id.* at 115 (ruling on IND. CODE § 35-48-4-15(a) (Supp. 1996)).

136. *Id.* at 115. *See also* *Pro-Eco, Inc. v. Board of Comm'rs*, 57 F.3d 505, 513 (7th Cir.) (Although the Due Process Clause protects a wider range of interests as property than does the Takings Clause, and thus an option to purchase real property may be construed as federally protected, county commissioners' promulgation of a moratorium following a public hearing where plaintiff's representative was present and could address the provision did not violate due process rights even if the board allegedly failed to follow state notice provisions.), *cert. denied.*, 116 S. Ct. 672 (1995); *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 107, 110 (Ind. Ct. App. 1995) (Landowners were not denied due process by the state's statutory scheme (IND. CODE §§ 32-8-3-1 to -11 (1993 & Supp. 1996)) that allows filing of a mechanic's lien without prior hearing or bond because the purpose of the lien would be defeated if a contested court hearing or bond was required before the notice of the lien took effect. Neither labor nor material can be reclaimed once it becomes a part of realty, this is the only method by which workmen who have contributed to the improvement of real property may be given a remedy against a property owner who defaults on a promise to pay.).

137. 666 N.E.2d 439 (Ind. Ct. App. 1996), *trans. denied.*

138. *Id.* at 442.

139. *Id.* at 444.

140. *Id.* at 445.

141. *Id.*

142. *Id.* at 444 (citations omitted) (citing *Ingraham v. Wright*, 430 U.S. 651, 693 (1977); *Gormon v. University of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988)).

143. *Id.* at 445.

and subsequent correspondence disclosed all of the evidence against her.¹⁴⁴ Thus, the informal conference, which afforded her the opportunity to confront the professors and explain her side of the story, was all the “process” to which she was entitled.¹⁴⁵

In the employment area, the Seventh Circuit held in *Jones v. City of Gary*,¹⁴⁶ that a firefighter’s termination without a prior hearing did not violate procedural due process because the interests of the city in maintaining a full complement of firefighters for the benefit of the entire community outweighed Jones’ interest in his continued employment.¹⁴⁷ Thus, the post-suspension hearing provided adequate protection for Jones’ property interest.¹⁴⁸ The firefighter claimed the discharge was invalid because a medical problem prevented him from appearing at work, but the record demonstrated that the medical condition had already been subjected to three independent administrative evaluations, and thus there was a low risk of error.¹⁴⁹ Further, the Gary Fire Department was facing an emergency situation.¹⁵⁰ The court emphasized that it was not generally endorsing an absolute elimination of pre-suspension hearings for firefighters, but rather it was holding that in this context, and with regard to this particular firefighter, the post-suspension hearing would sufficiently protect his property interest.¹⁵¹

A police officer challenging his disciplinary hearing before the City of Franklin Board of Public Works and Safety fared no better. In *Rynerson v. City of Franklin*,¹⁵² the officer challenged the statutory procedure¹⁵³ whereby a city attorney who serves as an appointed member of the Board may temporarily resign in order to prosecute a disciplinary action before the same Board.¹⁵⁴ The court of appeals had ruled the procedure unconstitutional,¹⁵⁵ but the Indiana Supreme Court, although conceding that due process requires a neutral, unbiased decisionmaker, found that the statutory arrangement achieved a sufficient separation of prosecutorial functions and adjudicative functions so as to meet the due process requirement.¹⁵⁶ The court reasoned that it should presume that members of a board are persons of “conscience and intellectual discipline, capable

144. *Id.*

145. *Id.*

146. 57 F.3d 1435 (7th Cir. 1995).

147. *Id.* at 1445.

148. *Id.*

149. *Id.* at 1443.

150. *Id.* at 1444.

151. *Id.*

152. 669 N.E.2d 964 (Ind. 1996).

153. IND. CODE § 36-8-3-4 (1988 & Supp. 1989) (codified as amended at IND. CODE § 36-8-3-4 (Supp. 1996)).

154. *Rynerson*, 669 N.E.2d at 966.

155. 655 N.E.2d 126, 129 (Ind. Ct. App. 1995), *vacated*, 669 N.E.2d 964 (Ind. 1996).

156. *Rynerson*, 669 N.E.2d at 967. *Rynerson* also claimed violation of article I, section 12, requiring “due course of law” but the court considered both challenges using a generic due process analysis.

of judging the particular controversy fairly.”¹⁵⁷ Further, it explained that the inquiry should be a practical one. In this particular case, there was no evidence that the statute prohibiting the city attorney from participating as a safety board member was not scrupulously complied with, nor was there any evidence of actual bias or prejudice on the part of the two participating board members.¹⁵⁸ In addition, the court took into account the practical concern that much of the Board’s work requires assistance of the city attorney and that prohibiting the city attorney from serving as a board member would “work a substantial disruption to the operations of city government.”¹⁵⁹ Thus, the court concluded that due process is not violated by allowing a city attorney to serve as member of the Board of Public Works and Safety so long as the attorney does not simultaneously participate in any police or fire disciplinary proceeding.¹⁶⁰

B. Substantive Due Process

The U.S. Supreme Court has recognized that the Due Process Clause also contains a substantive component that bars arbitrary, wrongful government conduct. However, the Court generally has been very reluctant to find a substantive due process violation, requiring that the conduct be truly “conscience-shocking” before it will intervene. The most hotly contested substantive due process issue addressed by the Supreme Court this term was the question of whether due process imposes a limitation on the jury’s power to impose punitive damages. Although the Court has held that such a limitation can be read into substantive due process, in *TXO Production Corp. v. Alliance Resources Corp.*¹⁶¹ the Court sustained a punitive damage award 526 times greater than the compensatory damage award. Justice Scalia, who has argued that there should be no substantive due process limitation on punitive damages at all, quipped that “the great majority of due process challenges to punitive damage awards can henceforth be disposed of simply with the observation that ‘this is no worse than *TXO*.’”¹⁶²

Contrary to the Justice’s prediction, the Supreme Court in *BMW of North America, Inc. v. Gore*,¹⁶³ held that a \$2 million punitive damages award was grossly excessive and therefore exceeded the constitutional limits.¹⁶⁴ An Alabama jury had awarded \$4 million against BMW for failing to disclose that it repainted a new \$40,000 car, thereby reducing its value by \$4000.¹⁶⁵ Although the Alabama Supreme Court reduced the punitive damages award to \$2 million, the company

157. *Id.* at 968 (citing *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)).

158. *Id.* at 969.

159. *Id.*

160. *Id.* at 970.

161. 509 U.S. 443, 444 (1993).

162. *Id.* at 472 (Scalia, J., concurring).

163. 116 S. Ct. 1589 (1996).

164. *Id.* at 1598.

165. *Id.* at 1594.

still argued the award was excessive.¹⁶⁶

In reaching its conclusion that BMW's conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it, a five-Justice majority pointed to three criteria: (1) the conduct was not particularly reprehensible in that it involved only economic harm and it evinced no indifference to or reckless disregard for the health and safety of others;¹⁶⁷ (2) the ratio between compensatory and punitive damages weighed against the plaintiff because the award was 500 times the amount of the actual harm;¹⁶⁸ and (3) the difference between this remedy and civil remedies authorized or imposed in comparable cases was great in that the \$2 million was substantially more than the \$2000 in fines and penalties imposed in other states for similar malfeasance.¹⁶⁹ The Court emphasized its concern that BMW would not have had adequate notice of the magnitude of the sanction that Alabama might impose in light of the pertinent statutes¹⁷⁰ and interpretive decisions.¹⁷¹ Finally, because there was no history here of non-compliance, there was no basis for assuming that a more modest sanction would not have been sufficient.¹⁷²

Despite the Supreme Court's decision in *Gore*, it is unlikely that we will see a huge revolution in the area of substantive due process. Generally the Supreme

166. *Id.* at 1595.

167. *Id.* at 1599.

168. *Id.* at 1602.

169. *Id.* at 1603.

170. *See* ALA. CODE § 8-9-11(b) (1993).

171. *Gore*, 116 S. Ct. at 1603.

172. *Id.* The analysis in *Gore* was applied in *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 785-86 (N.D. Ind. 1996) in assessing whether a punitive damage award was excessive. Although the defendants did not allege the award violated substantive due process, the court noted that the inquiry in *Gore* was "akin to that posed" in a case seeking to determine whether under Indiana law an award is "grossly excessive." *Id.* at 785. Applying the three "guideposts" from *Gore*, the court concluded that a \$600,000 award was grossly excessive where the defendant's tortious conduct consisted primarily of an insurance carrier's omissions in reckless disregard of plaintiff's rights under the policy, though not in reckless disregard of health or safety, *id.*, the disparity between the actual damages and punitive damages was great because the jury's award was 13 times the actual damages; and the award was disproportionate as compared to criminal and civil penalties imposed for similar conduct—under Indiana law every felony is punishable by a maximum fine of \$10,000. *See* IND. CODE §§ 35-50-2-4 to -7 (1993 & Supp. 1996). None of the Indiana cases holding insurers liable for punitive damages involved an award of anything near \$600,000. *Schimizzi*, 928 F. Supp. at 786. In short, the court concluded that the defendant's "conduct does not rank high on the reprehensibility scale, [plaintiff's] economic injury occasioned by non-payment is easily ascertained, the court already has considered damages for [plaintiff's] emotional distress (the factor that is difficult to determine) in examining the ratio, and [plaintiff's] economic damages were not small." *Id.* Indiana cases concerning the amount of punitive damages needed to vindicate the public policy behind Indiana law point in the same direction as the "guideposts" identified by the Supreme Court in *Gore*, and the \$600,000 award was "monstrously excessive and without rational connection to the evidence." *Id.*

Court has shown great reluctance to intervene under this amorphous provision, as reflected in its decision in *Bennis v. Michigan*.¹⁷³ Tina Bennis was a joint owner, with her husband, of an automobile which was used by her spouse to engage in sexual activity with a prostitute.¹⁷⁴ The state invoked its public nuisance law¹⁷⁵ to seize the vehicle and permitted no off-set for the wife's interest even though she lacked any knowledge of her husband's activity.¹⁷⁶ Bennis claimed she was punished without any wrongdoing in violation of the fundamental fairness guaranteed by substantive due process.¹⁷⁷ The Supreme Court in a 5-4 decision ruled that Michigan's abatement scheme did not deprive Mrs. Bennis of her property without due process.¹⁷⁸ The majority relied on a long and unbroken line of cases holding that an owner's interest in property may be forfeited by reason of the use to which the property is put even absent the owner's knowledge or consent.¹⁷⁹ Cases dating to 1827 established this principle, and it was simply too firmly fixed to now be displaced despite Bennis' status as "innocent owner."¹⁸⁰

Justice Ginsburg, whose fifth vote was necessary to create a majority, emphasized that the nuisance abatement proceeding was an equitable action, which should guard against "exorbitant applications of the statute."¹⁸¹ Because the specific facts here involved an automobile that had been purchased for \$600, the trial court could not be charged with "blatant unfairness."¹⁸²

The Seventh Circuit has similarly expressed reluctance to find a substantive due process violation, especially where only property rights are at stake. In fact, it has held that where a plaintiff complains only of unreasonable deprivation of a state-created property interest, he must show the inadequacy of state law remedies in order to proceed with the federal claim.¹⁸³ In *Pro-Eco, Inc. v. Board of*

173. 116 S. Ct. 994 (1996).

174. *Id.* at 996.

175. MICH. COMP. LAWS ANN. §§ 600.3801, -.3825 (West 1987 & Supp. 1997).

176. *Bennis*, 116 S. Ct. at 997.

177. *Id.* at 997-98.

178. *Id.* at 998.

179. *Id.* at 998-1000.

180. *Id.* at 1001.

181. *Id.* at 1003 (Ginsburg, J., concurring).

182. *Id.*

183. See, e.g., *Porter v. DiBlasio*, 93 F.3d 301 (7th Cir. 1996). In order to state viable substantive due process claims, a plaintiff must, in addition to alleging that a decision was arbitrary and irrational, show either a separate constitutional violation or the inadequacy of state law remedies. *Id.* at 310. Plaintiff's allegation that the seizures of his animals constituted a Takings Clause violation was deficient. *Id.* at 310-11. Because he failed to make alternative showing that his state law remedies (a claim for conversion and a right to request the property be returned. *Id.* at 304 (citing WIS. STAT. ANN. § 968.20(1) (West Supp. 1996))) were inadequate, his substantive due process claims failed. *Id.* at 310. See also *Doherty v. City of Chicago*, 75 F.3d 318, 326 (7th Cir. 1996) (Because plaintiff challenging denial of zoning application failed to demonstrate that she did not have recourse in state court, her federal claims were properly dismissed.); *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) (A property owner may not avoid

Commissioners,¹⁸⁴ the court ruled that the county's moratorium on new landfills was rationally related to a legitimate state interest in public health and thus did not violate substantive due process even though the owner of the interest in the land had already invested capital and labor in excess of \$200,000 at the time the legislative body took this action.¹⁸⁵ The court emphasized that government action survives the rational basis test imposed under the substantive due process clause provided a sound reason may be hypothesized; government is not required "to prove the reason to a court's satisfaction."¹⁸⁶

Litigants alleging deprivation of a liberty interest fared no better. In *Estate of Cole v. Fromm*,¹⁸⁷ the court held that the plaintiffs could not recover following a jail suicide from the psychiatrist who classified the pre-trial detainee in a psychiatric ward as a "potential suicide" risk rather than as a "high risk."¹⁸⁸ The court explained that deliberate indifference to medical needs must be shown in order for a plaintiff to recover. Deliberate indifference may be inferred from a medical professional's erroneous treatment decision only when it is such a substantial departure from accepted professional judgment as to demonstrate that the person responsible did not base the decision on such judgment.¹⁸⁹ In this case, the psychiatrist's decision was not a substantial departure from accepted professional judgment so as to give rise to a constitutional violation.¹⁹⁰

In *Pena v. Mattox*,¹⁹¹ the court ruled that a natural father whose parenthood results from criminal intercourse with a minor has no liberty interest that would permit him to block adoption of the child.¹⁹² Similarly in *Mitchell v. State*,¹⁹³ the Indiana Supreme Court held that because there is no fundamental right to drive, the state statute¹⁹⁴ that requires a sentencing court to revoke the driver's license of persons convicted of certain crimes need only bear a rational relationship to a legitimate state interest.¹⁹⁵ The state's interest in punishing and deterring lawbreakers, even if there is no nexus between the use of a vehicle and the underlying criminal conduct, satisfies this test.¹⁹⁶

the requirement that state remedies be exhausted by applying the label "substantive due process" to the claim; "federal courts are not boards of zoning appeals.").

184. 57 F.3d 505 (7th Cir.), *cert. denied*, 116 S. Ct. 672 (1995).

185. *Id.* at 514.

186. *Id.*

187. 94 F.3d 254 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 945 (1997).

188. *Id.* at 263.

189. *Id.* at 261-62.

190. *Id.* at 263.

191. 84 F.3d 894 (7th Cir. 1996).

192. *Id.* at 899.

193. 659 N.E.2d 112 (Ind. 1995).

194. IND. CODE § 35-48-4-15 (Supp. 1996).

195. *Mitchell*, 659 N.E.2d at 116.

196. *See id.* *See also* Nowicki v. Ullsvik, 69 F.3d 1320, 1325 (7th Cir. 1995) (Although judge's order prohibiting paralegal from representing party in divorce action allegedly deprived him of his chance to pursue his liberty interest in his "occupation," state action that excludes a person

In another case the Indiana Court of Appeals emphasized that substantive due process should not be used “where the wrong committed by the state actor was traditionally governed by tort law principles.”¹⁹⁷ Plaintiffs injured in a passenger train collision alleged that the government-operated railroad and its officials should be held liable for their gross negligence and deliberate indifference to passenger safety based on their failure to install and equip trains with devices that could avoid collision.¹⁹⁸ The victims also charged the defendants with failure to provide adequate warnings and signals that could have prevented the disaster. They argued that the railroad’s conduct demonstrated deliberate indifference to “life, liberty, freedom from bodily harm, personal security and safe travel under the Due Process Clause of the Fourteenth Amendment.”¹⁹⁹ Although the Supreme Court has held that the government has no general constitutional obligation to provide safe working conditions or other forms of governmental protection,²⁰⁰ the plaintiffs argued that train passengers fit within the “in-custody” exception that applies when the government takes persons into custody without their consent; e.g., government owes a duty to protect inmates and others whom it has institutionalized.²⁰¹ However, the court concluded that train passengers are not in the custody of the state, but rather have on their own free will decided to board the trains.²⁰² Further, the court rejected the notion that the plaintiffs fell within the “state-created danger” exception suggested in Supreme Court dicta.²⁰³ It noted that this exception has not been embraced universally and that it has been specifically rejected by other courts in situations involving railway accidents.²⁰⁴ In short, the court concluded that the plaintiff’s complaint was “analogous to a typical tort claim for negligence,” and that federal civil rights law was “not intended to supplant state tort law by providing a remedy for every wrong.”²⁰⁵

from one particular job is not actionable under the Due Process Clause.).

197. *In re Train Collision at Gary*, 670 N.E.2d 902, 906 (Ind. Ct. App. 1996), *trans. denied* (pertaining to liability under 42 U.S.C. § 1983 (1994)).

198. *Id.* at 906.

199. *Id.*

200. *Id.* at 906-07.

201. *Id.* at 907 (citing *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 199-200 (1989)).

202. *Id.*

203. *Id.* at 907-08.

204. *Id.* at 908. State constitutional challenges arising from this same incident are discussed *supra* note 47 and notes 103-07 and accompanying text.

205. *Id.* at 908-09. *See also* *Hill v. Shobe*, 93 F.3d 418, 421-22 (7th Cir. 1996) (plaintiff failed to state § 1983 claim when on-duty police officer ran a red light and killed the plaintiff, despite allegations that officers then conspired to cover up incident; the fact that public official commits a common law tort with tragic results fails to rise to level of violation of substantive due process absent a showing that official knew an accident was imminent but consciously and culpably refused to prevent it, and it does not suffice to demonstrate that public official acted in face of a recognizable but generic risk to the public at large). *See* 42 U.S.C. § 1983 (1994).

However, in *Camp v. Gregory*,²⁰⁶ the Seventh Circuit concluded that plaintiffs stated a claim for deprivation of substantive due process where they alleged that a social worker knowingly returned a child to a previous guardian who could not provide adequate care and supervision with the result that the child was killed in neighborhood violence.²⁰⁷ Similarly, in *Clark v. Donahue*,²⁰⁸ a federal district court rejected a defendant's claim that patients who are voluntarily admitted to a state mental institution have no substantive due process right to be protected from mistreatment.²⁰⁹ The court reasoned that "institutionalization which originated voluntarily may at some point involve restraint of personal liberty sufficient to trigger the protections of the due process clause."²¹⁰

The most profound substantive due process issue addressed by the Supreme Court was the question of whether terminally ill patients have a right to choose to end their suffering by obtaining lethal medication from doctors. Two federal appellate courts struck down state laws barring doctor-aided suicide, calling into question the validity of similar legislation in some forty states. In *Quill v. Vacco*,²¹¹ the Second Circuit ruled that New York statutes that impose criminal penalties on anyone who "aids another person to commit suicide"²¹² violate equal protection to the extent they prohibit physicians from prescribing drugs to be self-administered by mentally competent, terminally ill persons who seek to hasten death, but do not prohibit physicians from acceding to requests by such persons to withdraw life support systems.²¹³ In *Compassion in Dying v. State*,²¹⁴ the Ninth Circuit held unconstitutional a Washington statute²¹⁵ based on the theory that such laws deny a liberty interest in choosing the time and manner of death.²¹⁶ Although the Second Circuit opinion was based on equal protection analysis, the Ninth Circuit found a substantive due process liberty interest in choosing "a dignified and humane death," which the court held outweighed the state's interest in preserving life.²¹⁷

The Supreme Court unanimously overturned both decisions. In *Washington v. Glucksberg*,²¹⁸ four Justices joined Chief Justice Rehnquist's opinion concluding that the alleged "right" to assistance in committing suicide is not a fundamental liberty interest.²¹⁹ Chief Justice Rehnquist explained that substantive

206. 67 F.3d 1286 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2498 (1996).

207. *Id.* at 1294-98.

208. 885 F. Supp. 1159 (S.D. Ind. 1995).

209. *Id.* at 1162.

210. *Id.*

211. 80 F.3d 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997).

212. N.Y. PENAL LAW §§ 125.15(3), 120.30 (McKinney 1987 & Supp. 1997).

213. *Quill*, 80 F.3d at 727.

214. 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* 117 S. Ct. 2258 (1997).

215. WASH. REV. CODE ANN. § 9A36.060 (West 1988 & Supp. 1997).

216. *Compassion in Dying*, 79 F.3d at 839.

217. *Id.* at 837.

218. 117 S. Ct. 2258 (1997).

219. *Id.* at 2271.

due process analysis requires a “careful description” of the asserted liberty interest.²²⁰ Because the Washington statute prohibits “aiding another person to attempt suicide,” the court of appeals erred in addressing a general right to die or “right to choose a humane, dignified death.”²²¹ Characterizing the issue as whether “liberty” includes a “right to commit suicide which itself includes a right to assistance in doing so,” the Court readily concluded that this right has no place in our Nation’s traditions given the country’s consistent, almost universal and continuing rejection of the right, even for terminally ill, mentally competent adults.²²² Because such a right is not “deeply rooted in this Nation’s history and tradition” it cannot be ranked as a fundamental liberty interest.²²³

The Court distinguished its earlier holding in *Cruzan v. Missouri Department of Health*,²²⁴ which involved refusal of lifesaving hydration and nutrition. That interest is grounded in the Nation’s history and tradition in light of the common-law rule that forced medication is a battery and the long tradition that protects the decision to refuse unwanted medical treatment.²²⁵ Finally, the Court concluded that Washington’s assisted-suicide ban was rationally related to legitimate government interests, including prohibiting intentional killing and preserving human life, protecting the medical profession’s integrity and ethics, and protecting the poor, the elderly, disabled persons, the terminally ill, and other vulnerable persons from indifference, prejudice, or other pressure to end their lives.²²⁶

Justice O’Connor’s concurring opinion, joined by Justices Ginsburg and Breyer, emphasizes that although she agrees there is no generalized right to “commit suicide,” the parties all agreed here that the state statutes did not prevent qualified physicians from providing medication to alleviate suffering of those experiencing great pain, even to the point of causing unconsciousness and hastening death.²²⁷ She specifically notes that the question of whether suffering patients have a constitutionally cognizable interest in obtaining relief from this suffering was not in question: “There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths.”²²⁸ The concurring Justices similarly emphasize that the Court addressed only the facial challenge to the law and that the decision should not be interpreted to mean that every possible application of the statute would be valid.²²⁹

In *Vacco v. Quill*,²³⁰ the Court, for many of the same reasons articulated in

220. *Id.* at 2269.

221. *Id.*

222. *Id.* at 2271.

223. *Id.*

224. 497 U.S. 261 (1990).

225. *Glucksberg*, 117 S. Ct. at 2270.

226. *Id.* at 2271-72.

227. *Id.* at 2203 (O’Connor, J., concurring).

228. *Id.*

229. *Id.*; *id.* at 2304 (Stevens, J., concurring); *id.* at 2311 (Breyer, J., concurring).

230. 117 S. Ct. 2293 (1997).

Glucksberg, rejected the equal protection challenge to New York's statutes.²³¹ Because the statutes did not infringe fundamental rights nor involved suspect classifications, they were entitled to a strong presumption of validity.²³² The Court reasoned that the articulated state interests justified the distinction between physician-assisted suicide and the withdrawal of life support: "[T]he distinction drawn between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical, it is certainly rational."²³³ The distinction is recognized in tort law, in medicine, and by the overwhelming majority of the states.²³⁴ Thus, the facial challenge to the law must fail.

C. Equal Protection

The basic demand of the Equal Protection Clause is that persons similarly situated be treated the same. Ordinarily, as is the case with substantive due process, the Court indulges a strong presumption of constitutionality.²³⁵ The burden is on the challenger to demonstrate that the classification scheme is irrational.²³⁶ However, under certain conditions the Court will strictly scrutinize the challenged governmental action, i.e., where the classification scheme burdens a fundamental right or singles out a "suspect" group.²³⁷ To trigger this heightened scrutiny the Court asks whether the group burdened is politically powerless, whether it has traditionally been subject to discrimination, and whether members of the group have an immutable trait.²³⁸ This past Term the U.S. Supreme Court

231. *Id.* at 2297.

232. *Id.*

233. *Id.* at 2298.

234. *Id.* at 2299-2300.

235. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993). *See also* *Reilly v. Daly*, 666 N.E.2d 439, 445-46 (Ind. Ct. App. 1996), *trans. denied* (Student was not denied equal protection by medical school's failure to adopt dismissal policies similar to those applied to undergraduate and law students because she is not similarly situated to those students but rather is enrolled in a wholly distinct educational forum; each school at Indiana University is permitted to adopt its own procedures for suspensions and dismissals, consistent with its individual needs and policies.).

236. *Beach Communications*, 508 U.S. at 315. The Supreme Court emphasized that in areas of social and economic policy a statutory scheme is valid if any reasonably conceivable state of facts provides a rational basis for the justification and that those attacking the rationality carry the burden of negating every conceivable basis that might support the law. *Id.*

237. The reference to a racial classification as suspect originated with *Korematsu v. United States*, 323 U.S. 214 (1944).

238. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360-66 (1978). In addition to finding that classifications based on race, national or ethnic origin, and to a certain degree alienage trigger strict scrutiny, the Court has applied a so-called intermediate approach to laws that classify based on gender or illegitimacy. *See* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender discrimination); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (children born out of wedlock).

addressed classification schemes based on gender and homosexuality; it confronted the question of what level of scrutiny should apply with regard to these groups and whether the government enactments would withstand that level of scrutiny.

In *United States v. Virginia*,²³⁹ the Court ruled 7-1²⁴⁰ that a state-supported military college's long tradition of excluding women violates the Equal Protection Clause. Although the Court refused to apply strict scrutiny, which governs racial classifications, the majority opinion reaffirmed that the Court will impose a fairly strict "intermediate scrutiny" for gender-based classifications.²⁴¹ Whereas under strict scrutiny the government's interest must be compelling and the means must be narrowly tailored, under intermediate scrutiny it suffices that the classification serves "important governmental objectives" and be "substantially related to the achievement of those objectives."²⁴² Citing earlier case precedent, the Court emphasized that the state must show an "exceedingly persuasive justification" for a gender classification.²⁴³

Justice Ginsburg rejected the state's argument that its desire to provide diversity in higher education and to preserve the "adversative" teaching method used to produce "citizen soldiers" justified the male-only policy at the Virginia Military Institute (VMI).²⁴⁴ She stated that "[n]either recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options."²⁴⁵ She rejected state expert testimony that women would not benefit from, and that their presence would require changes in, VMI's methodology, reasoning that the successful entry of women into federal military academies demonstrates that the adversative methodology is not inherently unsuitable for women.²⁴⁶ She reasoned that the school would only have to make modest accommodations for privacy and for physical training to permit women's attendance.²⁴⁷

After the commencement of the litigation, Virginia attempted to cure the constitutional violation by establishing a separate "leadership" program for women at Mary Baldwin College, a private women's school.²⁴⁸ The Court ruled that this was inadequate to redress "the categorical exclusion of women from an extraordinary educational opportunity afforded men."²⁴⁹ Justice Ginsburg noted that the alternative program dropped the adversative training method completely, it provided inferior educational opportunities and no access to VMI's influential

239. 116 S. Ct. 2264 (1996).

240. Because Justice Thomas' son was attending VMI, he recused himself from the decision.

241. *United States v. Virginia*, 116 S. Ct. at 2274-75.

242. *Id.* at 2275.

243. *Id.* at 2279.

244. *Id.* at 2279-82.

245. *Id.* at 2279-80.

246. *Id.* at 2281.

247. *Id.* at 2284 n.19.

248. *Id.* at 2282.

249. *Id.* at 2282, 2286.

alumni network.²⁵⁰

In dissent, Justice Scalia attacked the majority for in essence applying strict scrutiny to a gender-based classification scheme.²⁵¹ He opined that the Court's analysis may mark the end of all government support of single-sex education.²⁵² He argued that the decision was contrary to the well-established tradition of single-sex education, and that the majority ignored a record wherein the State established the importance of its male-only program and the likelihood that the admission of women would destroy that program—thus satisfying intermediate scrutiny.²⁵³ Justice Ginsburg, however, was careful to say that single-sex education was not definitively closed by this decision²⁵⁴—the state had simply failed to show that the program for women was anything more than a “pale shadow” of its male counterpart.²⁵⁵

In a second major equal protection ruling, *Romer v. Evans*,²⁵⁶ the Supreme Court struck down a Colorado constitutional amendment that barred state and local government from extending protection to gay, lesbian, and bisexual citizens.²⁵⁷ Writing for a 6-3 majority, Justice Kennedy held that the enactment imposed a “special disability” on gays and seemed to be motivated by “animus” toward homosexuals.²⁵⁸ The majority did not rule that homosexuals constitute a suspect or even quasi-suspect class, which would trigger heightened review of the amendment. Indeed, ten years ago the Supreme Court in *Bowers v. Hardwick*²⁵⁹ rejected a due process challenge to Georgia's anti-sodomy law,²⁶⁰ but Justice Kennedy did not even mention that decision.

Three dissenting Justices argued that the majority opinion contradicts *Bowers*.²⁶¹ If it is constitutionally permissible to make homosexual conduct a

250. *Id.* at 2283-85.

251. *Id.* at 2294 (Scalia, J., dissenting).

252. *Id.* at 2306.

253. *Id.* at 2296-2302.

254. *Id.* at 2276 n.7.

255. *Id.* at 2285.

256. 116 S. Ct. 1620 (1996).

257. *Id.* at 1628. The Amendment not only repealed or rescinded all enacted ordinances which banned discrimination based on sexual orientation, but it also prohibited all future protective legislation or executive or judicial action. “Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.” COLO. CONST. art. II, § 30(b).

258. *Romer*, 116 S. Ct. at 1627.

259. 478 U.S. 186 (1986).

260. GA. CODE ANN. § 16-6-2 (1984) (codified as amended at GA. CODE ANN. § 16-6-2 (1996)).

261. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

crime, then it must be permissible to enact laws “merely disfavoring homosexual conduct.”²⁶² Although the majority did not mention *Bowers*, its holding that laws “born of animosity” toward homosexuals are unconstitutional²⁶³ is difficult to square with the *Bowers* decision.

The majority held that the amendment failed even rational basis analysis.²⁶⁴ Justice Kennedy reasoned that the breadth of the amendment (it precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on homosexual, lesbian, or bisexual orientation, conduct, practices or relationships) demonstrated that it is “so far removed” from the state’s purported interest in respecting other citizens’ freedom of association and in conserving resources to combat other forms of discrimination.²⁶⁵ The amendment forced immediate repeal of all existing statutes, regulations, ordinances, and policies of state and local entities barring discrimination based on sexual orientation, and its ultimate effect was to prohibit any government entity in the future from adopting similar or more protective measures in the absence of another constitutional amendment.²⁶⁶ Thus, the Court ruled that this broad disqualification of a class of persons from the right to obtain specific protection from the law is “unprecedented” and is “itself a denial of equal protection of the laws in the most literal sense.”²⁶⁷

Rather than focusing on the nature of the group being disadvantaged, Justice Kennedy appeared to rely more on the basic principle that government must remain open to all who seek assistance and that any law that singles out a group because of animosity towards that group is prohibited by the Equal Protection Clause.²⁶⁸ Although *Bowers* was based on a substantive due process claim—the defendant argued he had a fundamental right to engage in homosexual conduct—it is probably fair to say that the 6-3 decision suggests this Court is more receptive to gay rights.²⁶⁹

262. *Id.* at 1631 (emphasis omitted).

263. *Id.* at 1628.

264. *Id.* at 1629.

265. *Id.*

266. *Id.* at 1624-25.

267. *Id.* at 1628. Justice Kennedy also quoted from *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), that a “bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.*

268. *Id.*

269. However, it may not be terribly anxious to confront the issue. It recently denied certiorari in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc), *cert. denied*, 117 S. Ct. 358 (1996), which sustained the military’s “Don’t Ask, Don’t Tell” policy (10 U.S.C.A. § 654 (West Supp. 1997)), under which the Department of Defense discharges service members who disclose their homosexuality unless they rebut a presumption that they do not engage in homosexual conduct. The appellate court held that the law is rationally related to the military’s legitimate interest in preserving unit cohesion and thus does not violate the Fifth Amendment guarantee of equal protection. *Thomasson*, 80 F.3d at 931. The court also rejected a First Amendment challenge, reasoning that the law did not target speech. *See also* *Able v. United States*, 88 F.3d

The most significant equal protection claims raised by Indiana litigants involved race discrimination and discrimination against children born out of wedlock. In *Platt v. State*,²⁷⁰ the plaintiffs challenged the inadequately staffed and funded public defender system on grounds that it discriminated against African-Americans.²⁷¹ Despite statistics indicating that 60% of persons represented by public defenders in the county were African-American whereas only 25% of the population was African-American, the court ruled that plaintiffs failed to sustain their burden of proving that the public defender system was enacted and operated with the purposeful intent of discriminating against African-Americans.²⁷² Because only intentional discrimination against a protected group triggers strict scrutiny, the plaintiffs failed to establish a *prima facie* case.²⁷³

In *Haas v. Chater*,²⁷⁴ the plaintiffs challenged the constitutionality of an Indiana statute²⁷⁵ requiring a child born out of wedlock to prove paternity of an intestate father within five months of the father's death in order to qualify for inheritance.²⁷⁶ The Supreme Court has ruled that classification schemes that burden children born out of wedlock, like gender-based classification schemes, are subject to intermediate scrutiny, under which any law must be substantially related to an important government interest.²⁷⁷ Although the Supreme Court has interpreted the Equal Protection Clause as forbidding unreasonable discrimination against children born out of wedlock, in *Lalli v. Lalli*,²⁷⁸ it sustained a state statute that required a court order of filiation issued before the putative father's death. Reasoning that the restriction in *Lalli*, which foreclosed paternity suits brought after the father's death, was significantly more rigid than Indiana's, the Seventh Circuit sustained the Indiana law.²⁷⁹ *Lalli* relied on the state's alleged substantial interest in protecting the decedent's estate against phony claims and in winding up these estates.²⁸⁰ Since *Lalli*, the Supreme Court has struck down state statutes that impose unrealistic burdens on children attempting to establish paternity.²⁸¹ None

1280 (2d Cir. 1996), rejecting the First Amendment challenge to this provision. *Id.* at 1295-97.

270. 664 N.E.2d 357 (Ind. Ct. App. 1996), *trans. denied*, and *cert. denied*, 117 S. Ct. 1470 (1997).

271. *Id.* at 364.

272. *Id.* at 365.

273. *Id.*

274. 79 F.3d 559 (7th Cir.), *aff'd by an equally divided court*, 89 F.3d 838 (7th Cir. 1996) (en banc) (unpublished table decision), *cert. denied*, 117 S. Ct. 942 (1997).

275. IND. CODE § 29-1-2-7(b) (1993).

276. *Haas*, 79 F.3d at 561.

277. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

278. 439 U.S. 259, 275-76 (1978).

279. *Haas*, 79 F.3d at 564-65.

280. *Lalli*, 439 U.S. at 268.

281. In *Clark*, 486 U.S. at 465, the Court held that a six-year statute of limitations for bringing a paternity action (42 PA. CONS. STAT. ANN. § 6704(b) (West 1982) (repealed 1990)) failed intermediate scrutiny because it was not substantially related to an important government interest. *Clark*, 486 U.S. at 462.

of these cases, however, have involved intestate fathers, and *Lalli's* holding on probate matters has never been overruled. Several years ago the Indiana Court of Appeals similarly upheld the constitutionality of the five-month limitations period.²⁸²

D. Free Speech and Association

First Amendment issues figured prominently in recent decisions. As in past years, commercial speech cases, as well as cases involving the free speech rights of government employees, have generated the most litigation. In addition, this term the U.S. Supreme Court tackled difficult questions involving the free speech and association rights of independent contractors.

1. *Commercial Speech*.—Since 1976, the Supreme Court has recognized First Amendment protection for commercial speech, although it has never afforded that speech the full protection of non-commercial speech.²⁸³ Commercial speech is protected only to the extent it conveys truthful information to consumers, and, thus, a state may ban false, deceptive, or misleading commercial speech.²⁸⁴ Further, even if the commercial speech is truthful and non-misleading, it may be regulated provided the law directly and materially advances a substantial interest in a manner no more extensive than necessary.²⁸⁵ Although on its face the standard is not a toothless one, several Supreme Court decisions dictate that government has greater leeway in regulating commercial as opposed to non-commercial speech.²⁸⁶

Nonetheless, in *44 Liquormart, Inc. v. Rhode Island*,²⁸⁷ the Court ruled that a state law²⁸⁸ that banned advertisement of retail liquor prices except at the place of sale violated the First Amendment.²⁸⁹ Although the decision was unanimous, there was no majority opinion. The fundamental question posed by the case was whether government should be permitted to influence people's conduct by controlling the messages being advertised rather than regulating the products

282. See *S.V. v. Estate of Bellamy*, 579 N.E.2d 144 (Ind. Ct. App. 1991).

283. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762-65 (1976).

284. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

285. See *id.* at 566.

286. See, e.g., *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993) (sustaining a federal statute (18 U.S.C. § 1304 (1994)) that criminalized television and radio broadcasting of lottery advertisements by licensees who operate in a state that prohibits lotteries); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (upholding a content-based statute singling out advertising of gambling parlors because it served a substantial state interest in reducing the demand for casino gambling by Puerto Rican residents). See P.R. LAWS ANN. tit. 15, § 71 (1972) (codified as amended at P.R. LAWS ANN. tit. 15, § 71 (1995)).

287. 116 S. Ct. 1495 (1996).

288. R.I. GEN. LAWS § 3-8-7 (1987).

289. *44 Liquormart*, 116 S. Ct. at 1514.

themselves. Rhode Island defended the statute on grounds that the prohibition on advertising would reduce consumption and encourage temperance among the residents.²⁹⁰ Justice Stevens, joined by Justices Kennedy, Ginsburg, and Souter, argued that regulations seeking to suppress commercial speech in order to pursue a policy not related to consumer protection with regard to the product must be viewed with “special care.”²⁹¹ The *Central Hudson* standard was based on the state’s greater authority to regulate potentially deceptive or overreaching advertising—concerns not implicated in “speech” that simply discloses retail liquor prices. Applying *Central Hudson* with this “special care,” these Justices concluded that Rhode Island’s ban on liquor price advertising did not directly advance the state’s interest in temperance.²⁹²

Justice O’Connor, concurring in a separate opinion joined by Justices Rehnquist, Souter, and Breyer, declined to consider whether the *Central Hudson* test should be modified or displaced.²⁹³ She reasoned that even applying that test, the state’s goal of discouraging consumption could have been achieved through less speech restrictive means, e.g., per capita consumption limits, educational campaigns or increased sales tax.²⁹⁴ Because “the fit between ends and means is not narrowly tailored,” it failed the *Central Hudson* test.²⁹⁵ Because alternatives, such as increased educational campaigns and taxation, are always available alternative means, Justice O’Connor’s opinion may in reality preclude regulation that seeks to suppress consumption. Writing separately, Justice Thomas proposed to do away entirely with *Central Hudson*.²⁹⁶ He rejected as per se illegitimate any government interest in keeping “legal users of a product or service ignorant in order to manipulate their choices in the marketplace.”²⁹⁷

Although the Court failed to reach a majority consensus, *44 Liquor Mart* overturns much of the Supreme Court’s 1986 decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,²⁹⁸ wherein the Court upheld regulations that barred advertising of Puerto Rican casinos within the Commonwealth.²⁹⁹ In *44 Liquor Mart*, a majority of the Justices, albeit in separate opinions, repudiated the *Posadas* doctrine that the government can suppress non-misleading speech for the purpose of dampening public demand for a product.³⁰⁰ Further, a majority rejected the suggestion in *Posadas* that gambling activity can be regulated more

290. See *id.* at 1509.

291. *Id.* at 1508-09 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 n.9 (1980)).

292. *Id.* at 1510.

293. *Id.* at 1522 (O’Connor, J., concurring).

294. *Id.*

295. *Id.*

296. *Id.* at 1515 (Thomas, J., concurring).

297. *Id.* at 1515-16.

298. 478 U.S. 328 (1986).

299. *Id.* at 343.

300. *44 Liquormart*, 116 S. Ct. at 1512, 1513 n.20, 1519 (Thomas, J., concurring).

restrictively because it involves a “vice.”³⁰¹ Thus, although the Court refused to overrule *Central Hudson*, certainly this case suggests that the test will be applied more stringently where the government’s interest is to suppress truthful, non-misleading information for paternalistic purposes.³⁰²

2. *Free Speech Rights of Government Employees and Independent Contractors.*—The Supreme Court has held that government cannot condition employment upon relinquishing First Amendment rights.³⁰³ However, it has also made it clear that the free speech rights of government employees are not the same as those enjoyed by other citizens. Rather, courts must balance “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs.”³⁰⁴ In *Connick v. Myers*,³⁰⁵ the Court somewhat refined this test by demanding that an initial inquiry be made as to whether the government employee’s speech is a matter of public concern because “private” speech is entitled to little, if any, First Amendment protection.³⁰⁶ In *Johnson v. University of Wisconsin-Eau Claire*,³⁰⁷ the Seventh Circuit ruled that plaintiff’s speech protesting her base salary rate as discriminatory related solely to a personal problem and therefore could not be fairly characterized as speech on a matter of public concern.³⁰⁸ Similarly, in *Lashbrook v. Oerkfitz*,³⁰⁹ the court reasoned that even if the alleged inappropriate firing of a park district director was a matter of public concern, plaintiff’s specific speech addressed only a private dispute with a park district and was not an effort at whistleblowing or some other matter of concern to the public generally, and thus the speech was unprotected.³¹⁰

Several litigants met the “public concern” threshold, but could not survive the

301. See *id.* at 1513, 1520 n.10.

302. Actually, the notion that paternalism is an impermissible reason to ban advertising was a key holding in the Supreme Court’s first decision to recognize any First Amendment protection for commercial speech. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (striking down Virginia’s ban on advertising of prescription drug prices). Subsequent decisions like *Central Hudson* and *Posadas* found that restricting advertising in order to suppress the demand for the advertised product was a permissible end. After *Liquormart* it would appear that advertising bans designed to suppress consumption will nearly always be struck. Compare *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997) (city ordinance banning stationary outdoor advertising of alcoholic beverages in areas where children are likely to walk to school or play did not violate First Amendment’s commercial speech guarantees). See BALTIMORE, MD. CITY CODE, art. 30, § 10.0-1(h) (1994).

303. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

304. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

305. 461 U.S. 138 (1983).

306. *Id.* at 147.

307. 70 F.3d 469 (7th Cir. 1995).

308. *Id.* at 482.

309. 65 F.3d 1339 (7th Cir. 1995).

310. *Id.* at 1350.

“balancing” test.³¹¹ In *Warzon v. Drew*,³¹² the Seventh Circuit ruled that confidential or policymaking employees can be terminated even for speech that is of public concern if the speech advocates positions in conflict with the stated policy of their superiors.³¹³ The court reasoned that in this situation it can be inferred that the operations of government will be adversely affected to such a degree as to outweigh free speech rights.³¹⁴ However, the court left open the question of “whether an elected official may fire a policymaker for speaking out on issues not related to her job.”³¹⁵

Similarly, in *Jefferson v. Ambroz*,³¹⁶ the court held that a probation officer who participated in a radio talk show program on which he made extremely critical comments regarding the local criminal justice system could be terminated for his remarks even though he did not identify himself on the show.³¹⁷ The city’s interest in the efficient operation of its probation department far outweighed the plaintiff’s interest in the speech in question.³¹⁸ The court emphasized that loyalty and confidence are particularly critical to a probation officer’s position, and that the plaintiff’s statements potentially caused damage to the probation office’s public image and relationship with other law enforcement agencies.³¹⁹ Further, actual disruption need not be proved since the Supreme Court has made it clear that judges are to “look to the facts as the employer reasonably found them to be,” and that the government is entitled to consider the “potential disruptiveness of the speech.”³²⁰ Finally, the court rejected the plaintiff’s claim that he should have simply been transferred but not terminated, ruling that government employers “need not accommodate those employees who engage in agency-damaging speech by finding non-public-contact positions for them until ‘the heat blows over.’”³²¹

In contrast, in *Dishnow v. School District of Rib Lake*,³²² the court sustained the First Amendment claims brought by a high school guidance counselor who was terminated after he informed the media about the school board’s alleged violation of open-meetings law and vocally opposed removal of a novel from the school library.³²³ The court first ruled that the counselor had engaged in speech that touched on matters of public concern despite the fact that the issues “were not of global significance” or “vital to the survival of Western civilization.”³²⁴

311. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

312. 60 F.3d 1234 (7th Cir. 1995).

313. *Id.* at 1238-39.

314. *Id.* at 1238.

315. *Id.* at 1238 n.1.

316. 90 F.3d 1291 (7th Cir. 1996).

317. *Id.* at 1296-98.

318. *Id.* at 1296.

319. *Id.*

320. *Id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 677, 680 (1994)).

321. *Id.* at 1298.

322. 77 F.3d 194 (7th Cir. 1996).

323. *Id.* at 196, 199.

324. *Id.* at 197.

Because the defendants had argued Dishnow's speech was not of public concern, they did not ask the court to engage in a *Pickering-Connick* balance.³²⁵ The Seventh Circuit held that defendants should have asked the judge to determine whether the speech was so inimical to the maintenance of a proper educational atmosphere as to justify the discharge.³²⁶ Because the defendants failed to do so, and this is a matter for the judge not the jury to decide, the defendants waived this defense.³²⁷

Where political affiliation alone, unaccompanied by other forms of expression, is the basis for the adverse employment action, the Court has applied a different analysis. In *Elrod v. Burns*³²⁸ and *Branti v. Finkel*,³²⁹ the Court held that government officials may not discharge public employees for refusing to support a political party or its candidates unless political affiliation is a reasonably appropriate requirement for the job in question.³³⁰ In *Rutan v. Republican Party*,³³¹ the Court extended this protection to include patronage-based decisions regarding hiring, promotion, transfer, and recall decisions.³³² Once an employee has established that protected association was a motivating factor in the government's decision, the burden shifts to the government to prove that political affiliation is "an appropriate requirement for the effective performance" of the job in question.³³³

In *Americanos v. Carter*,³³⁴ the Indiana Attorney General was able to meet this standard. She demonstrated that deputy attorneys general have meaningful input into deciding how to handle legal issues for the state.³³⁵ Further, there was a potential for principled disagreement on which goals were primary in the Attorney General's representation of the state.³³⁶ Thus, political loyalty was an appropriate requirement for the effective performance of the tasks involved.³³⁷ A similar conclusion has been reached by the Seventh Circuit with regard to deputy sheriffs.³³⁸ Nonetheless, in *Wallace v. Benware*,³³⁹ the court ruled that even though a sheriff may discharge his deputy for political reasons, he will not escape First Amendment liability for retaliatory harassment of the deputy.³⁴⁰ The court

325. *Id.* at 197-98.

326. *Id.* at 197.

327. *See id.*

328. 427 U.S. 347 (1976).

329. 445 U.S. 507 (1980).

330. *Elrod*, 427 U.S. at 349; *Branti*, 445 U.S. at 518.

331. 497 U.S. 62 (1990).

332. *Id.* at 71.

333. *See Branti*, 445 U.S. at 518.

334. 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996).

335. *Id.* at 142.

336. *Id.*

337. *Id.*

338. *See Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991).

339. 67 F.3d 655 (7th Cir. 1995).

340. *Id.* at 663-64.

could not see how harassing government employees in any way advances the government's interest in efficiency or productivity.³⁴¹

Finally, the Seventh Circuit held that in so-called "hybrid" cases, where employees are terminated for speech that is part of their partisan activity, the *Pickering* balance rather than the straightforward *Elrod-Branti* analysis that governs "passive affiliation" should apply. In *Caruso v. DeLuca*,³⁴² the court reasoned that, "[t]he line between those cases that are appropriately analyzed under *Branti* and those that ought to be analyzed under the *Connick-Pickering* methodology is not a 'stark' one."³⁴³ It concluded that where an employee is challenging an employer's incident-specific response to speech that was considered detrimental to future working relationships, the *Connick-Pickering* analysis "provides the most sure-footed analytical path."³⁴⁴ Here the defendant's legitimate management concerns with respect to the efficient operation of the clerk's office outweighed the plaintiff's First Amendment interests.³⁴⁵

This past Term the Supreme Court was asked to decide whether these two lines of cases, involving free speech and free association rights of government employees, apply to independent contractors. The plaintiffs in both cases argued that they should be entitled to greater protection than government employees. The contractors argued that, like other private citizens, they should not be coerced into relinquishing their First Amendment freedoms unless the government can show a compelling government interest and means narrowly tailored to that interest. They argued that because they do not work on a daily basis with government officials, the government interests expressed in *Pickering* in maintaining harmonious working environment and relationships are attenuated. Further, because independent contractors would not be perceived as part of government, there would be less concern that political statements might be confused with the government's political positions.³⁴⁶

On the other hand, the government argued that independent contractors should be provided even less First Amendment protection than that afforded government employees. Independent contractors' First Amendment rights are much less significant because, unlike government employees, they probably do not rely for their livelihood on this government benefit.³⁴⁷

In both cases, the Court ruled, 7-2, that the First Amendment protects independent contractors and that the *Pickering* and *Elrod* standards should be applied. In *Board of City Commissioners v. Umbehr*,³⁴⁸ the Court addressed the plight of an independent contractor whose ten-year hauling contract was

341. *Id.*

342. 81 F.3d 666 (7th Cir. 1996).

343. *Id.* at 669.

344. *Id.*

345. *See id.* at 671.

346. *See Board of City Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2348 (1996).

347. *O'Hare Truck Service v. City of Northlake*, 116 S. Ct. 2353, 2359 (1996).

348. 116 S. Ct. 2342 (1996).

terminated after he spoke out against the Board of Commissioners.³⁴⁹ Umbehr not only wrote critical letters and editorials in local newspapers regarding the county's various practices, but ran unsuccessfully for election to the board.³⁵⁰ Justice O'Connor recognized that there were differences between independent contractors and employees and that both the government's interest as well as the speaker's interests were of lesser magnitude.³⁵¹ She concluded, however, that the *Pickering* balancing test, adjusted to these varying interests, provided an adequate standard for reviewing such claims: "all of [these arguments] can be accommodated by applying our existing framework for government employee cases to independent contractors."³⁵²

Justice O'Connor reasoned that *Pickering* already involves a fact-sensitive and deferential weighing of the government's legitimate interests.³⁵³ In achieving this balance, judges may take into account the fact that the government's interest as contractor may be less than its interest as employer. It should also realize that when government exercises its contractual power, rather than its sovereign power, against private citizens, it has a special "interest in being free from intensive judicial supervision of its daily management functions. . . ."³⁵⁴ Justice O'Connor also expressed concern that constitutional claims should not be adjudicated based on such formal distinctions as whether the government agency classifies someone as a contractor or employee.³⁵⁵

The Court advised that on remand Umbehr must show that termination of his contract was motivated by his speech on a matter of public concern.³⁵⁶ If he does so, the board may defend either by establishing by a preponderance of the evidence that board members would have terminated the contract regardless of the speech or by proving that the county's legitimate interests, deferentially viewed, outweigh the free speech interests at stake.³⁵⁷ Further, even if Umbehr prevails, evidence that board members discovered facts after termination that would have led to a later termination anyway, or that Umbehr mitigated his losses by means of subsequent contracts, would be relevant in assessing an appropriate remedy.³⁵⁸

In a scathing dissent, Justice Scalia, joined by Justice Thomas, argued that there was no textual or historical basis for providing First Amendment protection to independent contractors.³⁵⁹ To the contrary, there is a long American political tradition of awarding contracts based on political affiliation: "What secret knowledge, one must wonder, is breathed into lawyers when they become Justices

349. *Id.* at 2345.

350. *Id.*

351. *Id.* at 2352.

352. *Id.* at 2348.

353. *Id.*

354. *Id.* at 2349.

355. *Id.*

356. *Id.* at 2352.

357. *Id.* (citation omitted).

358. *Id.*

359. *Id.* at 2362-65 (Scalia, J., dissenting).

of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have *regarded* as constitutional for 200 years, is in fact unconstitutional?"³⁶⁰

In a second case, *O'Hare Truck Service v. City of Northlake*,³⁶¹ the Court tackled the question of whether *Elrod* and *Branti* apply where government retaliates against a contractor, or a regular provider of services, for exercising free speech and association rights.³⁶² In *O'Hare*, the city maintained a rotation list of available companies to perform towing services at its request, and it had a policy of not removing companies from the list absent cause.³⁶³ O'Hare Truck Service, which had provided services for some thirty years, was removed after its owner refused to contribute to the Northlake mayor's re-election campaign and instead supported his opponent.³⁶⁴ Although the case appeared to involve the hybrid problem where political affiliation and free speech are intermixed, the lower courts apparently analyzed the case as a straightforward *Elrod-Branti* situation.³⁶⁵ The Supreme Court held that the case-by-case adjudication required by that test in proving whether political affiliation is an appropriate requirement for job performance should be applied to independent contractors.³⁶⁶ Further, it reasoned that this flexible analysis would accommodate those cases where speech and political affiliation claims are intermixed.³⁶⁷ As in *Umbehr*, the Court was satisfied that judges could properly take into account the concerns of government in having discretion to allocate contracts as well as the concerns of independent contractors to be free from this form of coercion.³⁶⁸

Justice Kennedy reasoned that if the owner had been a public employee whose job was to perform tow-truck operations, he could not have been discharged for refusing to contribute to the mayor's campaign or for supporting his opponent.³⁶⁹ He failed to see anything that could distinguish this situation, and, like Justice O'Connor, he expressed the fear that recognizing a distinction would invite manipulation by government to avoid constitutional liability simply by attaching different labels to particular jobs.³⁷⁰ The Court rejected the argument that independent contractors had lesser rights than employees since contractors depend to a lesser degree on government sources for their incomes.³⁷¹ It cited an amicus brief that estimated that 75% of towing companies provide services in connection

360. *Id.* at 2363 (emphasis added).

361. 116 S. Ct. 2353 (1996).

362. *Id.* at 2355.

363. *Id.* at 2356.

364. *Id.*

365. *Id.* at 2358. The Supreme Court noted that on remand the court must decide whether the case was governed by *Elrod-Branti* or by *Pickering*. *Id.* at 2361.

366. *Id.*

367. *Id.* at 2358.

368. *Id.*

369. *Id.*

370. *Id.* at 2359.

371. *Id.* at 2359-60.

with government requests and that referrals generated between 30% and 60% of their gross revenues.³⁷² In short, the Court refused to “draw a line excluding independent contractors from the First Amendment safeguards of political association afforded to employees.”³⁷³

It should be emphasized that *Umbehr* involved termination of a contract that the plaintiff had enjoyed on an exclusive and uninterrupted basis for several years³⁷⁴ and that in *O’Hare Truck Services* the company had been on the city’s towing list since 1965.³⁷⁵ In *Umbehr*, Justice O’Connor explained that because the suit concerned the termination of a pre-existing commercial relationship with the government, the Court did not have to and would not discuss “the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.”³⁷⁶ Although the Supreme Court in *Rutan v. Republican Party of Illinois*³⁷⁷ held that applicants for public employment cannot constitutionally be rejected on the basis of their political affiliation, the question of whether this ruling will be extended to independent contractors was left unanswered.³⁷⁸

E. Freedom of Religion: Prayer in Public Schools

Since the 1960s, the Supreme Court has closely adhered to the principle that prayer in public schools is prohibited by the Establishment Clause.³⁷⁹ This is the rule regardless of whether students deliver the prayer and regardless of whether the prayer ceremony is voluntary.³⁸⁰ Further, in *Lee v. Weisman*,³⁸¹ the Court, in a 5-4 decision, held that the Establishment Clause outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation ceremonies.³⁸² Justice Kennedy found that graduation prayers “bore the imprint of the state and put school-age children who objected in an untenable position.”³⁸³ He emphasized the heightened concern with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary school setting.³⁸⁴ The question of whether these same concerns apply in a university setting was addressed by a

372. *Id.* at 2359.

373. *Id.* at 2361.

374. *Umbehr*, 116 S. Ct. at 2345.

375. *O’Hare*, 116 S. Ct. at 2355.

376. *Umbehr*, 116 S. Ct. at 2352.

377. 497 U.S. 62, 65 (1990).

378. *Umbehr*, 116 S. Ct. at 2352.

379. U.S. CONST. amend I (“Congress shall make no law respecting an establishment of religion . . .”).

380. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (invalidating the practice of having students read passages from the Bible); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (striking down voluntary prayer).

381. 505 U.S. 577 (1992).

382. *Id.* at 586.

383. *Id.* at 590.

384. *Id.* at 592.

federal district court in Indiana.

In *Tanford v. Brand*,³⁸⁵ an Indiana University law school professor and some of his students, as well as one undergraduate student, alleged that the invocation and benediction delivered at Indiana University's commencement ceremonies violated the Establishment Clause.³⁸⁶ The district court initially denied a preliminary injunction,³⁸⁷ and this term it rejected the plaintiff's motion for summary judgment and granted judgment in defendant's favor.³⁸⁸ Distinguishing *Lee*, the district court ruled that college students do not require the same protection from coercion that bars comparable prayers at the elementary and secondary school levels.³⁸⁹ The plaintiffs were young adults being trained as lawyers, "a discipline that demands the ability to think independently, to analyze arguments skeptically and to disregard social pressures, peer or otherwise."³⁹⁰ Further, although plaintiffs included one undergraduate student, the court cited earlier Supreme Court precedent finding that college students are also less impressionable and less susceptible to religious indoctrination.³⁹¹ In addition, any coercive impact of the commencement ceremony was lessened by the fact that the size and context of the program were impersonal—thousands of graduates choose not to attend and a non-adherent could readily dissent without being noticed and without fear of being identified as a non-conformist.³⁹²

The court then proceeded to analyze the claim under the three-prong analysis set forth by the Supreme Court in *Lemon v. Kurtzman*,³⁹³ which requires that government programs share three characteristics in order to survive an Establishment Clause challenge: (1) the program must have a secular purpose; (2) the primary effect must not be to send a message of endorsement or disapproval of religion; and (3) the government program cannot create excessive entanglement between church and state.³⁹⁴ At least five current sitting Justices have strongly criticized *Lemon* and urged adoption of a more "accommodationist" approach to church-state relations. Some have argued that the Establishment Clause is violated only where the government has endorsed or demonstrated affirmative approval of religion,³⁹⁵ while others contend that the Establishment Clause bars only discrimination by government among religious organizations or coercive pressure by government to engage in religious activities.³⁹⁶ However, because *Lemon* has

385. 932 F. Supp. 1139 (S.D. Ind. 1996), *aff'd*, 104 F.3d 982 (7th Cir. 1997).

386. *Id.* at 1141.

387. *Id.* at 1139. *See Tanford v. Brand*, 883 F. Supp. 1231 (S.D. Ind. 1995).

388. *Tanford*, 932 F. Supp. at 1146-47.

389. *Id.* at 1143-44.

390. *Id.* at 1143.

391. *Id.* (citing *Tilton v. Richardson*, 403 U.S. 672, 686 (1971)).

392. *Id.* at 1144.

393. 403 U.S. 602 (1971).

394. *Id.* at 612-13. *See also Agostini v. Felton*, 117 S. Ct. 1997 (1997) (Court's latest Establishment Clause case).

395. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

396. *See Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

never been overruled, the district court in *Tanford* proceeded to apply its analysis.³⁹⁷

As to the first *Lemon* prong, the court reasoned that solemnizing the occasion and continuing a 155-year-old university tradition satisfied the secular purpose test.³⁹⁸ Next, in light of the non-sectarian and brief nature of the invocation and benediction, as well as the sophistication of the audience, the court did not see the thirty second prayer delivered as part of a larger secular ceremony as endorsing any particular religion or influencing people's religious beliefs.³⁹⁹ Finally, it saw little entanglement because the University's involvement was limited to inviting the clergy persons and giving general suggestions that the invocation and benediction be "uplifting."⁴⁰⁰ There was no need for frequent or pervasive contacts between university officials and local clergy.⁴⁰¹

Because plaintiffs could not demonstrate that they were entitled to summary judgment under *Lee* or under the traditional *Lemon* tests, the court denied them relief, and entered judgment in favor of the defendant.⁴⁰² The Seventh Circuit affirmed this ruling, adopting almost verbatim the district court's analysis under *Lee* and *Lemon*.⁴⁰³

397. *Tanford*, 932 F. Supp. at 1145.

398. *Id.*

399. *Id.* at 1146.

400. *Id.* Cf. *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996) (holding that the First Amendment does not bar suit against a church for negligent hiring, supervision, and retention, brought by a woman alleging sexual molestation by a minister. However, respondeat superior claim could not prevail because the minister was not engaging in authorized acts or otherwise serving his employer's interests.).

401. *Tanford*, 932 F. Supp. at 1146.

402. *Id.* at 1146-47.

403. *Tanford v. Brand*, 104 F.3d 982, 985-86 (7th Cir. 1997).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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This Article will focus on some of the major recent developments and cases in the area of criminal law and procedure that have been addressed by the 1996 Indiana General Assembly and Indiana appellate courts since the 1995 survey.

I. 1996 LEGISLATIVE ACTS

The 1996 Indiana General Assembly made several significant changes in the area of criminal law by amending the bail statute, creating a DNA database and modifying several other existing statutes.

A. *Bail and Bail Procedure*

The Indiana General Assembly addressed concerns that courts had no legal authority to consider the dangerousness of a defendant when setting bail. The concerns were addressed by making three changes to the bail statute.¹ First, the definition of “bail bond” was amended to include a “bond . . . for the purpose of ensuring . . . another person’s physical safety”² or “the safety of the community.”³ Second, the courts were given the discretion to consider whether a “defendant poses a risk of physical danger to another person or the community”⁴ and to consider factors “to assure the public’s physical safety”⁵ when admitting a defendant to bail and imposing release conditions. Considering these circumstances and “upon a showing of clear and convincing evidence” that the defendant poses a danger, the court may deny bail.⁶ Third, the legislature gave the court the authority to set the amount of bail in an amount not only to assure the defendant’s appearance in court⁷ but also to “assure the physical safety of another person or the community if the court finds by clear and convincing evidence that

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1. IND. CODE §§ 35-33-8-1 to -8 (1993 & Supp. 1996).

2. *Id.* § 35-33-8-1(2) (Supp. 1996).

3. *Id.* § 35-33-8-1(3).

4. *Id.* § 35-33-8-3.1(a).

5. *Id.*

6. *Id.* Although community safety is proper consideration in the setting of bail, it is not a proper consideration in the revocation of bail. *See Ray v. State*, 679 N.E.2d 1364 (Ind. Ct. App. 1997). Bail revocation is governed by section 35-33-8-5 of the Indiana Code, which is unaffected by the addition of the “community safety” exception to a different code section. IND. CODE § 35-33-8-5 (1993).

7. IND. CODE § 35-33-8-4(b) (Supp. 1996).

the defendant poses a risk to the physical safety of another person or the community.”⁸

These changes explicitly give courts the authority to consider a defendant’s dangerousness but do little to change the practical effect of the prior statute which gave the court the authority to consider “any other factors, including any evidence of instability and a disdain for authority.”⁹ A court may now state on the record that the defendant’s dangerousness, as perceived by the court, is the rationale for setting a high bail or no bail at all.¹⁰

B. Indiana’s DNA Data Base

The use of DNA analysis and genetic markers for identification purposes has increased in the last decade. Even though Indiana has enacted a statute that allows DNA evidence in a criminal trial,¹¹ there continues to be a great debate, even among experts, about standards in the industry.¹²

One of the major accomplishments of the 1996 General Assembly was the setting of DNA standards through the creation of an Indiana DNA Data Base.¹³ This statute sets out new procedures to be used in establishing a database of DNA identification records for “convicted criminals, crime scene specimens, unidentified missing persons, and close biological relatives of missing persons”¹⁴ in order to “assist federal, state, and local criminal justice and law enforcement agencies in the putative identification, detection, or exclusion of individuals who are subjects of an investigation or prosecution of a sex offense, a violent crime, or another crime in which biological evidence is recovered from the crime scene.”¹⁵ Unless the submission of a blood sample would present a substantial and unreasonable risk to the person’s health,¹⁶ all persons convicted of a felony offense against a person under article 35-42 of the Indiana Code, burglary under section 35-43-2-1 of the Indiana Code, or child solicitation under section 35-42-4-6 of the Indiana Code must provide a DNA sample to the Department of Corrections.¹⁷ This requirement applies to all such convicted persons after June 30, 1996, whether or not sentenced to a term of imprisonment, and to all persons convicted before July 1, 1996 if the person is held in jail or prison.¹⁸

8. *Id.*

9. *Id.* § 35-33-8-4(b)(9).

10. *But see* IND. CONST. art. I, § 17.

11. IND. CODE § 35-37-4-13(b) (1993).

12. *See* NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992).

13. IND. CODE §§ 10-1-9-1 to -22 (Supp. 1996).

14. *Id.* § 10-1-9-8(a).

15. *Id.* § 10-1-9-8(c).

16. *Id.* § 10-1-9-10(b).

17. *Id.* § 10-1-9-10(a). Similar requirements have been found constitutional by at least two courts. *See* *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996); *Cooper v. Gammon*, 943 S.W.2d 699 (Mo. Ct. App. 1997), *trans. denied*.

18. IND. CODE § 10-1-9-10 (a)(1), (2) (Supp. 1996).

The statute authorizes the State Police Department Superintendent to issue guidelines applicable to the “procedures for DNA sample collection and shipment within Indiana for DNA identification testing.”¹⁹ The tests performed on DNA samples are to be used to analyze and type the genetic markers in or derived from DNA,²⁰ for research or administrative purposes,²¹ and for law enforcement identification purposes.²²

Access to the database is limited to federal, state, and local law enforcement agencies “through their servicing forensic DNA laboratories.”²³ There are provisions in the statute to expunge DNA profiles from the database,²⁴ and criminal penalties may be imposed upon a person who “knowingly or intentionally disseminates, receives, or otherwise uses or attempts to use information in the Indiana DNA data base or DNA samples used in DNA analyses, knowing that such dissemination, receipt, or use is for a purpose other than authorized by law.”²⁵ Criminal penalties may also be imposed for tampering or attempting to tamper with a DNA sample.²⁶

C. Public Defender Reimbursement

For the last several years, local funding agencies have had difficulties paying for the ever increasing costs of court-appointed counsel. In an effort to require the courts to try to recoup some of these costs, the Indiana General Assembly enacted a statute that requires judges to determine at the initial hearing whether the defendant can partially pay for legal representation. If “the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following: (1) For a felony action, a fee of one hundred dollars (\$100); (2) For a misdemeanor action, a fee of fifty dollars (\$50).”²⁷ These funds are to be deposited in the county’s supplemental public defender services fund established under section 33-9-11.5-1 of the Indiana Code.²⁸ In addition, if the court finds that a person can pay part of the cost of representation by assigned counsel, the court is to order the defendant upon conviction to pay an amount not to exceed the cost of defense services rendered on behalf of the person.²⁹ These amounts are also to be deposited into the county’s supplemental public defender services fund.³⁰ Each person ordered to pay these costs is entitled to the same

19. *Id.* § 10-1-9-11.

20. *Id.* § 10-1-9-13(a)(1).

21. *Id.* § 10-1-9-13(a)(3).

22. *Id.* § 10-1-9-13(a)(2).

23. *Id.* § 10-1-9-21.

24. *Id.* § 10-1-9-20.

25. *Id.* § 10-1-9-16.

26. *Id.* § 10-1-9-15.

27. *Id.* § 35-33-7-6(c).

28. *Id.*

29. *Id.* § 33-19-2-3.

30. *Id.* § 33-9-11.5-1.

rights and protections as other judgment debtors,³¹ and the failure to pay such costs "is not grounds for revocation of probation."³²

D. Sex Offenses

The legislature modified several sex offense statutes in 1996. The age of offenders continues to occupy the time of the legislature as the 1996 Indiana General Assembly repealed the section of the child molesting statute³³ which enhanced the offense of fondling a child under the age of fourteen to a Class B felony, and, at the same time, provided child molesting offenses "committed by a person at least twenty-one (21) years of age"³⁴ as an additional reason to enhance the grade of the offenses. The penalties for sexual misconduct with a minor were increased from a Class C felony to a Class B felony if intercourse or deviate sexual conduct with a fourteen to sixteen year old was performed by someone twenty-one or older³⁵ and from a class D felony to a class C felony if the fondling or touching of a fourteen- to sixteen-year-old and was performed by someone twenty-one or older. The legislature increased the penalty for knowingly or intentionally failing to register as a sex offender from a Class A misdemeanor to a Class D felony for first time offenders³⁶ and from a Class D felony to a Class C felony for persons who have a "prior unrelated offense under this section."³⁷

Penalties for child exploitation and child solicitation were increased to provide for enhancements to the base offense to a Class C felony when committed by using a "computer network,"³⁸ which is defined as "the interconnection of communication lines with a computer through remote terminals or a complex consisting of two (2) or more interconnected computers."³⁹

E. Stalking

The legislature substantially increased the penalties for stalking when it increased the base offenses under the statute from a Class B misdemeanor to a Class D felony,⁴⁰ increased the Class A misdemeanor to a Class C felony,⁴¹ and increased the Class D felony to a Class B felony.⁴² The statute added factors to the Class C felony section to include violations of protective orders issued under chapter 31-6-4 of the Indiana Code for delinquency and Children in Need of

31. *Id.* § 33-9-11.5-6.

32. *Id.* § 35-38-2-3.

33. Act of Mar. 18, 1994, No. 79, § 12, 1994 Ind. Acts 1081, 1097-98 (repealed 1996).

34. IND. CODE § 35-42-4-3 (Supp. 1996).

35. *See id.* § 35-42-4-9(a)(1).

36. *See id.* § 5-2-12-9.

37. *Id.*

38. *Id.* § 35-42-4-6.

39. *Id.* § 35-43-2-3(a).

40. *See id.* § 35-45-10-5(a).

41. *See id.* § 35-45-10-5(b).

42. *See id.* § 35-45-10-5(c).

Services (CHINS) proceedings,⁴³ procedures in juvenile court under chapter 31-6-7 of the Indiana Code,⁴⁴ and protective orders to prevent abuse under section 34-4-5.1 of the Indiana Code.⁴⁵ In addition, for the first time under Indiana law, the legislature has given the court discretion when someone is convicted under this section of a Class C felony to impose judgment and conviction as a Class D felony.⁴⁶ Previously, such discretion to reduce the class of offense has only been granted to allow for the reduction of Class D felonies to Class A misdemeanors in certain circumstances.⁴⁷ The 1996 legislation now allows entry of conviction of a Class D felony for non-support of a child under section 35-46-1-5 of the Indiana Code.⁴⁸ This author predicts that the legislature will continue to give the courts more discretion to reduce the class of charges in an attempt to lessen the impact of mandatory minimum sentences and to alleviate the overcrowded Department of Corrections.

F. The Death Penalty

The 1996 legislature made two modifications to Indiana's death penalty statute.⁴⁹ The first amendment added that "[t]he defendant burned, mutilated, or tortured the victim while the victim was alive"⁵⁰ as an aggravating factor for which the death penalty may be sought. The second gives the court the ability to receive information from the victim's family by authorizing the court to "receive evidence of the crime's impact on members of the victim's family"⁵¹ prior to making the final determination of the sentence and by requiring the presentence report to contain victim impact statements and adhere to other victim notification requirements.⁵²

G. Other Enhancements

The legislature has given courts the power to suspend for one year the driver's

43. *Id.* § 35-45-10-5(b)(2)(B).

44. *Id.* § 35-45-10-5(b)(2)(C).

45. *Id.* § 35-45-10-5(b)(2)(D).

46. *See id.* § 35-45-10-5(e).

47. *See id.* § 35-50-2-7(b).

48. *Id.* § 35-50-2-6.

49. *Id.* § 35-20-2-9(b)(11).

50. *Id.* § 35-50-2-9.

51. *Id.* § 35-50-2-9(e). If challenged, the Indiana Supreme Court will likely uphold the constitutionality of this provision. In *Bivins v. State*, 642 N.E.2d 928, 955 (Ind. 1994), the court found that the admission of victim impact evidence was unconstitutional because it was not sufficiently related to "specific aggravating circumstances designated by our legislature as appropriate for the death sentence." In so doing, the court tacitly acknowledged that the legislature has the authority to determine what is an aggravating factor and what is not. Therefore, under *Bivins*, it seems likely that the court will defer to the legislature's will on this point.

52. *See* IND. CODE § 35-38-1-8.5 (Supp. 1996).

license of any person who commit criminal mischief which "involves graffiti."⁵³ Graffiti is defined as "any unauthorized inscription, work, figure, or design that is marked, etched, scratched, drawn, or painted on a component of any building, structure, or other facility."⁵⁴ The court may lift the suspension if the graffiti is removed or restitution is made, and the owner of the defaced or damaged property is satisfied with the removal or restitution.⁵⁵

The legislature added to the list of offenses for which any portion of a sentence in excess of the "minimum sentence" may be suspended by adding to the offense operating a vehicle while intoxicated under Indiana Code section 9-30-5 if the offender has accumulated at least two prior unrelated convictions under chapter 9-30-5 of the Indiana Code. Whether the reference to "an offense under I.C. 9-30-5"⁵⁶ makes the suspension limitation inapplicable to the .10% blood alcohol driving statute under section 9-30-5-5 of the Indiana Code remains unclear. If the .10% blood alcohol offense is not intended to be subject to the suspension limitation, is it not then true that a prior conviction for a .10% blood alcohol offense would not seemingly be considered a "prior unrelated conviction" on which the suspension limitation can be based? The language of this statute needs to be addressed and redrafted by the next session of the legislature if, in fact, that is what the legislature intends.

In *Freeman v. State*,⁵⁷ the Indiana Supreme Court determined that it was improper for the State to obtain a conviction under the general habitual substance offender statute for an operating while intoxicated offense that was enhanced to a Class D felony from a Class A misdemeanor.⁵⁸ The 1996 legislature sought to change this ruling by amending the habitual substance offender's definition of "substance offense" to include "an offense under IC 9-30-5 and an offense under IC 9-11-2."⁵⁹ This statute seeks to expressly make habitual substance offender enhancements available for alcohol and substance abuse driving offenses and attempts to abrogate the *Freeman* ruling. It is doubtful, however, that such a statutory change by the legislature can withstand a future constitutional double jeopardy challenge as described in *Freeman*.

The guilty but mentally ill statute⁶⁰ was amended to require the court to obtain an evaluation of the defendant by a psychiatrist, psychologist, or community mental health center *before* imposition of a guilty but mentally ill sentence regardless of whether the conviction is by trial or a plea of guilty.⁶¹

The chapter of the Indiana Code dealing with Children and Handguns⁶² was

53. *Id.* § 35-43-1-2(c).

54. *Id.* § 35-41-1-12.3.

55. *See id.* § 35-43-1-2(d).

56. *Id.* § 35-50-2-10(a)(2), (b).

57. 658 N.E.2d 68 (Ind. 1995).

58. *Id.* at 71.

59. IND. CODE § 35-50-2-10(a)(2).

60. *Id.* § 35-36-2-5.

61. *See id.* § 35-36-2-5(b).

62. *Id.* §§ 35-47-10-1 to -10.

amended to make the chapter applicable to “firearms” rather than “handguns.”⁶³ The sentencing statute was also amended to reflect that the term of imprisonment under “IC 35-47-10-6 [dangerous control of a firearm] or IC 35-47-10-7 [dangerous control of a child] may not be suspended if the commission of the offense was knowing or intentional.” This change makes the entire term of imprisonment and not just the “minimum sentence” under section 35-50-2-1(c) of the Indiana Code nonsuspendible for knowingly or intentionally committing these offenses.

The ten-year sentence enhancement for use of an assault weapon has been eliminated and in its place, the legislature substituted a five-year sentence enhancement for use of a firearm in the commission of an article 35-42 of the Indiana Code felony that resulted in death or serious bodily injury,⁶⁴ kidnapping,⁶⁵ or criminal confinement as a Class B felony.⁶⁶ This additional penalty is not suspendible.⁶⁷ The provisions of the statute that require the state to seek this enhancement by filing a separate page of the information requesting it and for the enhanced penalty to be imposed in the court’s discretion if the court finds after a sentencing hearing that the defendant used a “firearm in the commission of the offense” were retained.⁶⁸

II. CASE DEVELOPMENTS IN 1995-96

A. Search and Seizure

1. *The “Plain Feel” Doctrine.*—During the past year, there were several cases involving the “plain feel” doctrine. In *Parker v. State*,⁶⁹ an informant tipped an Indianapolis police officer that Parker was carrying cocaine and would be at a liquor store selling it. The informant had been paid by the police for several years and had provided information to the police that had led to the arrest of several other drug dealers. En route to find Parker, the police saw the informant who personally verified the information given minutes earlier to the police over the phone. The police went to the liquor store and found Parker. The police stopped Parker and his companion and conducted a patdown search. During the patdown, a police officer felt an object in Parker’s shorts that the police officer immediately determined to be cocaine. The officer reached into Parker’s pocket and pulled out a clear bag containing cocaine.

On an interlocutory appeal, the court evaluated the defendant’s assertion that the investigatory stop did not meet the requirements of *Terry v. Ohio*⁷⁰ by relying

63. *Id.* §§ 35-47-10-5 to -6.

64. *Id.* § 35-50-2-11(b)(1).

65. *Id.* § 35-50-2-11(b)(2).

66. *Id.* § 35-50-2-11(b)(3).

67. *Id.* § 35-50-2-2(f).

68. *Id.* § 35-50-2-11(d).

69. 662 N.E.2d 994 (Ind. Ct. App. 1996), *trans. denied*.

70. 392 U.S. 1 (1968).

on *Alabama v. White*.⁷¹ In *White*, the Court held that a tip of a confidential informant may constitute reasonable suspicion justifying an investigatory stop. This is a less demanding standard than probable cause both in the quantity and reliability of information necessary to make such a determination.⁷² The Court also found that such a determination must be based on a "totality of the circumstances."⁷³ In *Parker*, "the officers relied on the tip of a known informant who provided the information over the phone and in person, gave specific verifiable details, accurately predicted Parker's future actions, and had provided information in the past that led to other narcotics convictions. . . . [T]he tip provided sufficient indicia of reliability to justify the police's investigatory stop of Parker."⁷⁴ The court distinguished *Johnson v. State*,⁷⁵ in which the Indiana Supreme Court reversed a similar case when it recognized that the "informant's tip contained facts that any member of the general public could provide, and because there was no evidence that a single conviction ever resulted from one of the informant's tips."⁷⁶ Because the indicia of reliability that the court found lacking in *Johnson* were present in *Parker*, the court found that the stop was legal.⁷⁷

The court then examined the issue of the patdown search and the challenge by the defendant that the seizure of the cocaine went beyond the scope of a *Terry* frisk. The court examined *Minnesota v. Dickerson*,⁷⁸ which stands for the general principle that "police officers may seize contraband other than weapons during a patdown search as long as their search stays within the bounds of *Terry*."⁷⁹ The *Dickerson* Court explained:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.⁸⁰

In *Parker*, the police officer conducted a legitimate patdown search for weapons and immediately discovered contraband through his sense of touch.⁸¹ The search did not exceed that permissible by *Terry* or *Dickerson*.⁸²

71. 496 U.S. 325 (1990).

72. *Id.* at 330.

73. *Id.*

74. *Parker*, 662 N.E.2d at 997.

75. 659 N.E.2d 116 (Ind. 1995).

76. *Parker*, 662 N.E.2d at 997 (citing *Johnson*, 659 N.E.2d at 118-19).

77. *Id.* at 998.

78. 508 U.S. 366 (1993).

79. *Parker*, 662 N.E.2d at 998 (citing *Dickerson*, 508 U.S. at 373-74).

80. *Id.*

81. *Id.* at 999.

82. *Id.*

The court distinguished its holding in *Parker* from that of *C.D.T. v. State*,⁸³ which stands “for the proposition that once the police determine a suspect is not armed, no further search is permissible under *Terry*.”⁸⁴ The court found that the difference between the two cases was that, in *C.D.T.*, the officer had already determined that the suspect did not have a weapon at the time he came across the contraband, and, thus, by continuing the search he exceeded the scope of *Terry*.⁸⁵ In *Parker*, however, the officer was still in the process of conducting a patdown for weapons at the time he discovered the contraband.⁸⁶ In addition, the court relied on *Bratcher v. State*,⁸⁷ where the police stopped a vehicle suspected in a domestic dispute and then conducted a patdown of the driver for weapons. The officer felt a “soft item” in Bratcher’s pocket which was removed and found to be a bag containing marijuana.⁸⁸ The seizure of the drugs was upheld as being within the scope of *Terry*, because the officer “determined contemporaneously with his patdown search for weapons that the item in Bratcher’s pocket was marijuana, rather than during a further search after he concluded Bratcher did not possess a weapon.”⁸⁹

Judge Sullivan, in his well-considered dissent, would have reversed the trial court based on two factors. First, the *Dickerson* “plain feel” test would not have applied to powder cocaine, as discovered in *Parker*, because the “officer could not have determined it to be cocaine until he removed the plastic bag from Parker’s pocket and saw that it contained cocaine powder, as opposed to crack cocaine” which was the case in *Dickerson*.⁹⁰ Second, the officer’s discovery of the cocaine was not inadvertent as required, in his view, by the “plain view” doctrine.⁹¹ When *Parker* was stopped by the police, one officer immediately stated that he was conducting a narcotics investigation. “The informant had advised police that *Parker* would be carrying cocaine and would be selling the cocaine at the liquor store. It was clear, therefore, that the purpose in making the patdown was to

83. 653 N.E.2d 1041, 1047 (Ind. Ct. App. 1995).

84. *Parker*, 662 N.E.2d at 999.

85. *Id.* And the court is clearly correct in its distinction: a *Terry* frisk is only justified to protect an officer. Once the officer has ascertained that the person he has detained does not have weapons, the frisk must end. If he continues his patdown past that which is needed to ensure that the detainee is unarmed, he is violating the Fourth Amendment.

86. *Id.*

87. 661 N.E.2d 828 (Ind. Ct. App. 1996).

88. *Id.* at 830.

89. *Id.* at 832.

90. *Parker*, 662 N.E.2d at 1000 (Sullivan, J., dissenting).

91. *Id.* The Fourth Amendment does *not* require that the discovery be inadvertent. See *Horton v. California*, 496 U.S. 128, 130 (1990). Moreover, the case, *Wood v. State*, 592 N.E.2d 740 (Ind. Ct. App. 1992), which Judge Sullivan cites does not stand for the proposition that the discovery must be inadvertent. It merely holds open the possibility that article I, § 11 of the Indiana Constitution may have an inadvertence requirement. *Id.* at 742. Judge Shields disagreed. See *id.* at 745 (Shields, J., concurring).

ascertain the presence of cocaine.”⁹² Judge Sullivan therefore concluded that the majority opinions in *Bratcher* and *Parker* were wrong and should be reversed.⁹³

In *Walker v. State*,⁹⁴ police officers were dispatched to a bar to investigate a fight involving weapons and were told that Walker was involved. A police officer conducted a patdown of Walker and “sensed an article in Walker’s right hip pocket which he believed to be a bag of marijuana.”⁹⁵ Walker argued that the search and seizure violated the scope of the Fourth Amendment as permitted by *Terry*.⁹⁶ The officer testified that:

when he sensed the item he knew it was not a weapon and based upon his experience, he thought the item was a bag a marijuana. He indicated that he squeezed the items with his fingers but did not manipulate it in any way. More importantly, when asked the period of time between his realization that the item was not a weapon but marijuana, Officer Ogle responded “instantaneously.”⁹⁷

The court of appeals recognized that the seizure was immediate and “occasioned no further invasion of privacy beyond that already authorized by the officer’s search for weapons and, thus, its warrantless seizure was justified under *Terry*.”⁹⁸

In a unanimous decision in *Shinault v. State*,⁹⁹ a different panel of the court of appeals addressed similar claims. In the early evening a police officer saw Shinault standing face to face with another person who appeared to be “involved in a transaction.” When the two saw the police car, they immediately parted and walked briskly in opposite directions. A police officer followed Shinault and saw him put his hands into his jacket. The officer told Shinault to remove his hands, whereupon the officer observed a “bulge” in the jacket. When Shinault approached the officer, the officer detected a strong odor of marijuana. The officer conducted a patdown of Shinault and found a bag containing more than fifty grams of marijuana and arrested him.¹⁰⁰ Shinault filed a motion to suppress that the trial court denied.¹⁰¹

The court quickly resolved the stop and frisk claim of the defendant by

92. *Id.* The officer’s subjective motive is generally irrelevant in Fourth Amendment cases. See *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996). “Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment; *but we have repeatedly held and asserted the contrary.*” (emphasis added). See also *State v. Hollins*, 672 N.E.2d 427 (Ind. Ct. App. 1996), *trans. denied* (following *Whren*).

93. See *Parker*, 662 N.E.2d at 1001 (Sullivan, J., dissenting).

94. 661 N.E.2d 869 (Ind. Ct. App. 1996).

95. *Id.* at 870.

96. *Id.*

97. *Id.* at 871.

98. *Id.*

99. 668 N.E.2d 274 (Ind. Ct. App. 1996).

100. *Id.* at 276.

101. *Id.*

recognizing that “[u]nder the totality of the circumstances, [the officer] was justified in stopping Shinault to determine if he was engaged in criminal activity.”¹⁰² Because the trial court found that the officer had a “reasonable fear of danger” from Shinault, the officer was “justified in conducting a limited patdown search for his own safety”¹⁰³ The issue then became whether the “plain feel” doctrine applied. The court of appeals analyzed the facts in light of *Dickerson, Walker, and Parker* and found that

[the officer’s] discovery of marijuana was contemporaneous with his patdown search for weapons. He testified that he observed a cylindrical shaped bulge in Shinault’s pocket; that he did not know what it was; that he suspected it could be a “bag of pot,” but also realized it could be “a hundred different things”; that it felt like plastic, but because of its shape, he thought it could be a weapon. When questioned by the court, [the officer] said that he was not sure that the object was not a weapon until he pulled it out of Shinault’s pocket.¹⁰⁴

The court held that because the officer was unable to immediately eliminate the possibility that the tightly rolled plastic bag of marijuana was not some sort of dangerous weapon at the time of the seizure, the seizure was permissible under *Terry*.¹⁰⁵

2. *Probable Cause and Informant’s Tips*.—In *Johnson v. State*,¹⁰⁶ the Indiana Supreme Court granted transfer to review the propriety of a stop based on a confidential informant’s tip. The police began an investigation of Johnson, and the investigating officer put out a “Be on the Lookout” for Johnson based on a confidential informant’s tip.¹⁰⁷ Johnson had not committed any traffic violations or infractions in the presence of the police when they stopped him in the area where the informant said he would be. After he was stopped, Johnson immediately got out of his car and approached the police. The police

first asked appellant for identification and then told him that they had probable cause to believe he was transporting narcotics. Appellant asked if they were going to look down his pants. The officers said that they were but did not have to do it there, handcuffed appellant, placed him in the police car, and transported him to a safer area approximately three blocks away where they conducted a “pat-down” search of his person and required appellant to open his pants. The officers found a small amount of marijuana in the waistband of appellant’s trousers.¹⁰⁸

The majority examined the argument of the defendant in light of the principle

102. *Id.* at 277.

103. *Id.*

104. *Id.* (citations omitted).

105. *Id.*

106. 659 N.E.2d 116 (Ind. 1995).

107. *Id.* at 117.

108. *Id.*

established in *Terry*, that “(i)n order to justify this stop, the police must have had a reasonable suspicion that criminal activity was occurring, or was about to occur.”¹⁰⁹ Here, the court found that the informant’s tip provided no specifics by which the tip could be confirmed, said nothing that was not known by members of the general public, and none of the informant’s tips have ever resulted in a conviction.¹¹⁰ The court found that

there was evidence of neither a request for immediate police aid nor a credible informant warning of a specific impending crime. . . . [T]he tip in this case was completely lacking in indicia of reliability and the record offers no evidence that the confidential informant was reliable; the tip was, therefore, inadequate to support an investigatory stop.¹¹¹

The supreme court remanded the cause to the trial court with an order to suppress the result of the illegal search.¹¹²

Justice Sullivan’s dissent, with which Chief Justice Shepard concurred, eloquently stated that:

[t]he theory employed by the Court of Appeals in affirming the trial court’s denial of Johnson’s motion to suppress was that even if probable cause did not exist at the time the police stopped Johnson, there was reasonable suspicion under *Terry v. Ohio* to make the stop; then, during their encounter with Johnson, the officers corroborated aspects of the informants tip and probable cause arose to search Johnson and his car.¹¹³

The tip, along with the police officers analysis of Johnson’s behavior, established the “reasonable suspicion” necessary to stop the car.¹¹⁴ Additionally, Johnson’s question, “Are you going to look in my pants?” corroborated the informant’s tip and established probable cause necessary to justify the search.¹¹⁵ The minority would, therefore, have affirmed the trial court.¹¹⁶

3. *The Scope of a Consent to Search.*—In *Foreman v. State*,¹¹⁷ the defendant leased a room in a bingo center from Ogletree, the operator and manager. An investigator went to the center to see if it was operating under a proper permit and observed several hundred people playing bingo. Ogletree gave the investigator written consent to search the center. During the search, police officers encountered a locked door that they removed from its hinges. Inside the room, the officers found video gaming devices with stools in front of them whereupon Ogletree told the police that the machines were not his and that he leased the room

109. *Id.* at 118.

110. *Id.* at 119.

111. *Id.*

112. *Id.* at 120.

113. *Id.* (Sullivan, J., dissenting).

114. *Id.* at 122.

115. *Id.*

116. *Id.*

117. 662 N.E.2d 929 (Ind. 1996).

to Foreman. He also told them that the room was left open during bingo games to allow access to the patrons of the bingo center. Foreman was charged with two counts of professional gambling.¹¹⁸ He filed a motion to suppress claiming that Ogletree's written consent was invalid as to the room leased by Foreman.¹¹⁹

The supreme court found that, although consent to search may be given by a third person who has common control over the premises searched, "[t]o establish common authority, the State must show that the third party had joint access or control over the premises."¹²⁰ Here, the court of appeals did not rule on the issue of whether Ogletree had common authority but instead found that "where a third party does not actually have common control over the premises, if the police at the time of the entry reasonably believed that the third party had common control over the premises, the warrantless entry may be valid."¹²¹ The supreme court rejected the notion that the police could have had a reasonable belief that Ogletree had common control over the locked room because the police took the door off its hinges.¹²² Moreover, there was no evidence that Ogletree gave consent to search to room.¹²³ The supreme court stated,

We acknowledge that Ogletree had signed a written consent permitting a search of the Richmond Plaza Bingo Hall, without any explicit exclusion of the locked room. However, we cannot reconcile that fact with the inconsistent behavior of the police in removing the door off its hinges when Ogletree was standing right there and could have easily provided a key to unlock the door.¹²⁴

The court then examined the State's claim that the defendant did not have a reasonable expectation of privacy in the room searched. The court found that the room was not open to the public because one of the employees had closed and locked the door cutting off access to the general public, and that because the police had to remove the door from its hinges, the officers did not enter the room as regular customers.¹²⁵ Thus, because measures were taken to maintain privacy with respect to the room, Foreman had a subjective expectation of privacy when the door was closed and locked.¹²⁶ Finally, the court found that society would recognize such an expectation of privacy as reasonable where the general public no longer had access and the door was closed and locked.¹²⁷ Therefore, because Foreman "had a reasonable expectation of privacy in the leased room, there was no valid consent to search the premises, and no other valid exception to the

118. *See id.* at 930.

119. *See id.*

120. *Id.* at 932.

121. *Id.* (citing *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990)).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 933.

126. *Id.* at 934.

127. *Id.*

warrant requirement was claimed, the warrantless search of the leased premises was unconstitutional and the trial court's motion to suppress was appropriate."¹²⁸

B. Speedy Trial

In *Clark v. State*,¹²⁹ the Indiana Supreme Court attempted to resolve some of the long-standing confusion surrounding the congested court calendar exception to Criminal Rule 4.¹³⁰ Prior to *Clark*, two panels of the Indiana Court of Appeals had issued conflicting opinions on the subject. In *Bridwell v. State*,¹³¹ one panel held that trial court congestion need not be documented and would be accepted on appeal absent a claim of subterfuge.¹³² In *Raber v. State*,¹³³ another panel required that a trial court document the nature of its congestion.¹³⁴ In *Clark*, the supreme court announced a new rule which was more in line with *Bridwell*.

Clark orally requested a "fast and speedy trial" at his initial hearing.¹³⁵ The trial court set his case for jury trial on the seventieth day thereafter, in accordance with Criminal Rule 4(B). On Clark's trial date, however, the court issued an order continuing the case for over four months "due to congestion of Court's calendar."¹³⁶ Several weeks later, Clark moved for a discharge asserting that the seventy day time limit of Criminal Rule 4(B) had been exceeded.¹³⁷ At a hearing on that motion, the defense presented testimony that no jury trial was held in that court on the original trial date, nor were jurors even summoned to appear on that date.¹³⁸ There were seventeen criminal jury trials and two eviction hearings scheduled for that day. In denying the defendant's Motion for Discharge, the court noted its routine practice of setting several cases for trial on a given date and then assigning one case as the "number one" case to be on the "ready docket" on the Friday before the trial date. The remaining cases are "continued because of congestion."¹³⁹ Even though the "number one" case would sometimes be disposed of prior to trial, the court believed that congestion actually existed because "the

128. *Id.*

129. 659 N.E.2d 548 (Ind. 1995).

130. A criminal defendant who moves for an early trial "shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar." IND. R. CRIM. P. 4(B)(1).

131. 640 N.E.2d 437 (Ind. Ct. App. 1994).

132. *Id.* at 439.

133. 622 N.E.2d 541 (Ind. Ct. App. 1993).

134. *Id.* at 547.

135. *Clark v. State*, 659 N.E.2d 548, 550 (Ind. 1995).

136. *Id.*

137. *See id.*

138. *Id.*

139. *Id.*

congestion would be effective as [of] the Friday noon before the trial setting.”¹⁴⁰

On appeal, Clark asserted that no court congestion existed on the original trial date.¹⁴¹ The trial court had not entered its congestion order until the day of trial.¹⁴² Moreover, if court congestion truly existed, “the continuance would have been made at an earlier date, when the ‘number one’ case and ‘ready docket’ were determined.”¹⁴³ The State argued in response that:

sixteen other criminal jury trials were scheduled for [the original trial date]; that at least fourteen of these were older than the defendant’s case; and that no testimony was presented as to whether or not a bench trial may have been conducted . . . or whether a last-minute plea agreement or continuance had occurred on the “ready docket.”¹⁴⁴

Holding that an incarcerated defendant’s request for a speedy trial “requires particularized priority treatment,” the supreme court remanded the case with instructions to discharge the defendant.¹⁴⁵ The court held that Criminal Rule 4(B) cases “must be assigned a meaningful trial date within the time prescribed by the rule, if necessary superseding trial dates previously designated for civil cases and even criminal cases in which Criminal Rule 4 deadlines are not imminent.”¹⁴⁶ The court also held that on rare occasion, however, “complex trials that have long been scheduled or that pose significant extenuating circumstances to litigants and witnesses” may justify an exception this rule.¹⁴⁷

Procedurally, a defendant must file a Motion for Discharge and demonstrate that “at the time the trial court made its decision to postpone trial, the finding of congestion was factually or legally inaccurate.”¹⁴⁸ In the absence of trial court findings explaining the congestion, such proof will be *prima facie* adequate for discharge.¹⁴⁹ On appeal, the trial court’s findings will be accorded “reasonable deference,” and reversal will only occur if the trial court was “clearly erroneous.”¹⁵⁰

The supreme court also reconsidered *Bridwell*¹⁵¹ in light of its holding in *Clark*. Unlike Clark, Bridwell was released on bond during the pendency of his case.¹⁵² Thus, Criminal Rule 4(C) required that he be tried within 365 days of his arrest or indictment, instead of the seventy days prescribed by Criminal Rule 4(B)

140. *Id.*

141. *Id.* at 551.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 552.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Bridwell v. State*, 659 N.E.2d 552 (Ind. 1995).

152. *Id.* at 553.

for an in-custody defendant who moves for a speedy trial.¹⁵³ On appeal, Bridwell argued that his trial did not commence within 365 days of his arrest and that 209 days of the delay was attributable to court congestion which was not supported by a sufficient docket record.¹⁵⁴

The trial court used a pre-printed form which stated that the case was being continued due to congestion and reset for the court's earliest available trial setting.¹⁵⁵ Although Bridwell filed two motions for discharge prior to trial, he did not present any evidence to show that the findings of court congestion were "clearly erroneous" as required by *Clark*.¹⁵⁶ Because the requisite showing was not made, the supreme court upheld Bridwell's convictions.

The supreme court also considered Criminal Rule 4 in a slightly different context in *Jackson v. State*.¹⁵⁷ Jackson was incarcerated throughout the pendency of his case and moved pro se for a speedy trial on January 18.¹⁵⁸ The seventy-day time period of Criminal Rule 4(B) would therefore have expired on March 29. On March 21, Jackson requested a trial date consistent with his speedy trial request.¹⁵⁹ The trial court offered a trial date within those parameters, but the prosecutor informed the court that "the State would not be ready for trial" on the offered day.¹⁶⁰ Over the objection of the defendant, the court then set a trial date of May 16, which was well beyond the seventy day time period.¹⁶¹

On appeal, the State reasserted the trial court's reasoning for denying the defendant's Motion for Discharge, that the defendant's speedy trial motion was "apparently not served on the State of Indiana."¹⁶² The supreme court noted, however, that the prosecutor had merely stated that his file did not contain the written motion, but that Jackson's motion did contain a certificate of service.¹⁶³ Moreover, Jackson had brought his speedy trial demand to the attention of the judge who conducted his initial hearing. "His failure to mount a more aggressive campaign for a speedy trial hardly vitiates his right to that speedy trial."¹⁶⁴

The supreme court also rejected the State's argument that Jackson's case was continued due to a congested court calendar.¹⁶⁵ This contention was based on the trial judge's identification of several dates outside of the seventy-day period in

153. IND. R. CRIM. P. 4(B), 4(C).

154. *Bridwell*, 659 N.E.2d at 553.

155. Although the supreme court's opinion does not discuss the date of these congestion orders, the trial court's policy was to file the orders on the day prior to trial—not the day of trial as in *Clark*.

156. *Id.*

157. 663 N.E.2d 766 (Ind. 1996).

158. *Id.* at 768

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 769.

163. *Id.*

164. *Id.*

165. *Id.* at 770.

which the court was not available to conduct a trial.¹⁶⁶ However, the trial court had made itself available for the day before the seventy-day period expired.¹⁶⁷ The trial was continued beyond that date solely due to the prosecutor's unreadiness.¹⁶⁸ Because Jackson requested a speedy trial and did not receive it within the mandated seventy-day period—and the delay was not attributable to his actions or to a congested court calendar—the supreme court ordered the defendant discharged.¹⁶⁹

Although the supreme court made some strides toward clearing the uncertainty surrounding Criminal Rule 4 through the preceding three cases, some confusion still exists. The lesson of *Jackson*, however, is quite simple. When offered a trial date within the seventy-day period of Criminal Rule 4(B), the prosecution cannot refuse the date in exchange for a date beyond the seventy-day period. The trial court could, however, note its congestion on the record and continue the case beyond the seventy-day parameter. Moreover, the prosecution could have avoided this situation by agreeing to the release of the defendant or by dismissing the case and refileing it at a later time.

The lesson of *Clark* and *Bridwell*, however, is not so clear. How is a trial judge who has ten or more jury trials set on a given day supposed to decide which case goes to trial? What if more than one of these cases has a speedy trial demand and several of the defendants are incarcerated? This author takes the position that those defendants who have been incarcerated the longest should go to trial first. Allowing all incarcerated defendants to go to trial first, however, means that in some instances a defendant released on bond may not go to trial for well over a year. If a trial court enters justification of why a given case is not going to trial,¹⁷⁰ the supreme court's holding in *Clark* will result in the trial court's finding of congestion being upheld unless the finding is clearly erroneous.¹⁷¹

On a very different speedy trial issue, the Indiana Court of Appeals considered whether Criminal Rule 4 applies to a retrial for an habitual offender adjudication in *Poore v. State*.¹⁷² Poore was adjudicated to be an habitual offender.¹⁷³ The habitual offender adjudication was subsequently vacated through a post-conviction relief petition.¹⁷⁴ Poore was retried on the habitual offender count based on his

166. *Id.*

167. *Id.* at 769.

168. *Id.*

169. *See id.* at 770

170. An example of an appropriate congestion order might be as follows: "Due to the trial of *State v. John Smith* (case no. 97009876), a defendant who demanded a speedy trial on January 6, 1997, and has been continuously incarcerated for 94 days thereafter, the court continues this case until May 12, 1997, which is the next earliest available trial setting. Pursuant to *State v. Clark*, the court finds that the Criminal Rule 4 deadlines of Mr. Smith's case are more imminent than those of this case."

171. *Clark v. State*, 659 N.E.2d 548, 552 (Ind. 1995).

172. 660 N.E.2d 591 (Ind. Ct. App. 1996).

173. *See* IND. CODE § 35-50-2-8 (Supp. 1996).

174. *Poore*, 660 N.E.2d at 594.

other prior felony convictions, and a jury again found him to be an habitual offender.¹⁷⁵ On appeal, he asserted that he was denied his right to speedy trial because the retrial took place more than seventy days after he requested a speedy trial.¹⁷⁶

A two-member majority held that Criminal Rule 4 does not apply to a habitual offender retrial because such a determination occurs as part of sentencing, and speedy trial requirements are not applicable to sentencing.¹⁷⁷ The court provided several reasons for its "refusal to elevate an habitual offender determination to the status of a trial for purposes of Crim.R. 4(B)."¹⁷⁸ First, Criminal Rule 4(B) applies to defendants held in jail on an "indictment or information," and defendants such as Poore are generally being held because of an underlying felony.¹⁷⁹ Second, "the purposes behind the speedy trial rule are inapplicable to an habitual offender determination," as that rule is "intended to protect against the possibility of lost evidence or fading memories."¹⁸⁰ Finally, the majority was not persuaded by the fact that habitual offender proceedings are consistently referred to as "trials," because "calling a rooster an eagle does not make the rooster an eagle."¹⁸¹ Even though it contains some trial-like aspects, the habitual offender determination is part of the defendant's sentencing—thus making the time periods of Criminal Rule 4 inapplicable.

Judge Sullivan, in his dissent, noted the trial-like aspects of a habitual offender determination. The proceeding "involves factual determinations which are within the prerogative of the trier of fact," and it "must be proven by the state beyond a reasonable doubt."¹⁸² Moreover, an habitual determination is not purely a sentencing matter because it must be resolved by trial or retrial.¹⁸³

Although Judge Sullivan's dissent is factually correct and logical, this author finds the majority's opinion more persuasive. A defendant convicted of a felony has already been afforded the protections of Criminal Rule 4 once. Moreover, the factual determinations are very limited, as a habitual offender phase generally lasts no longer than one hour and largely consists of the jury reviewing documents. Finally, this author has never, during a six-year tenure on the bench, presided over a trial in which a jury found that the habitual offender enhancement was not proven.

175. *Id.*

176. *Id.*

177. *Id.* (citing *Alford v. State*, 294 N.E.2d 168, 170 (Ind. Ct. App. 1973), *overruled on other grounds by* *Holland v. State*, 352 N.E.2d 752 (Ind. 1976)).

178. *Id.*

179. *Id.* at 594-95.

180. *Id.* at 595 (citing *Alford*, 294 N.E.2d at 171).

181. *Id.* (quoting *Indiana Republican State Com. v. Saymaker*, 614 N.E.2d 981, 983 (Ind. Ct. App. 1993)).

182. *Id.* at 597.

183. *Id.* at 598.

C. Jury Selection

In a pair of cases, *Williams v. State*¹⁸⁴ and *Currin v. State*,¹⁸⁵ the Indiana Supreme Court addressed the propriety of a trial judge's sua sponte order requiring each side to present a race-neutral justification before exercising a peremptory challenge. In *Williams*, the supreme court upheld the defendant's murder conviction and death sentence, but established a new rule for future cases.¹⁸⁶ In *Williams*, the trial court required each attorney to give a race, ethnic, religious, sex-neutral reason for the use of each peremptory challenge.¹⁸⁷ Even though the prosecution did not object to the defendant's use of some peremptory challenges, the trial court found defense counsel's explanation inadequate on five occasions and refused to excuse the jurors.¹⁸⁸ On appeal, *Williams* argued that denial of the use of peremptory challenges was reversible error.¹⁸⁹

In considering *Williams*' claim, the court noted three separate legal principles: *Batson* principles, peremptory challenge principles, and trial management principles.¹⁹⁰ In *Batson v. Kentucky*¹⁹¹ and its progeny, the U.S. Supreme Court forbade the practice of using peremptory challenges to exclude members of a certain race from a jury. According to the Court, the Equal Protection Clause protects both defendants and prospective jurors from the racially discriminatory use of peremptory challenges.¹⁹² Under *Batson*, after a party raises an objection, the burden is on the opposing party to demonstrate that its adversary is striking the juror solely because of race or gender.¹⁹³ If a prima facie showing is made, the burden shifts to the party seeking to exercise the challenge to provide a neutral explanation for its use.¹⁹⁴ Thus, *Batson* principles and peremptory challenge principles require a court to wait for an objection before it can require a race-neutral justification for the use of a peremptory challenge.¹⁹⁵

Other jurisdictions, however, have expanded the scope of *Batson* and embraced the notion that a trial judge may sua sponte raise a *Batson* objection.¹⁹⁶ In *Williams*, the court found that the trial court's actions did not constitute

184. 669 N.E.2d 1372 (Ind. 1996).

185. 669 N.E.2d 976 (Ind. 1996).

186. *Williams*, 669 N.E.2d at 1372.

187. *Id.* at 1376.

188. *Id.* at 1380.

189. *Id.* at 1376.

190. *Id.*

191. 476 U.S. 79 (1986).

192. *Williams*, 669 N.E.2d at 1377.

193. *Id.* at 1378 (discussing *Pfister v. State*, 650 N.E.2d 1198 (Ind. Ct. App. 1995)).

194. *Id.*

195. *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam) is the Court's latest pronouncement on this issue.

196. *Williams*, 669 N.E.2d at 1379 (collecting cases). Although *Batson* does not express an opinion about whether a trial judge can sua sponte raise an objection. The Supreme Court is unlikely to ever *forbid* state trial judges from intervening when discrimination is "abundantly clear."

reversible error, as "it was within the discretion trial courts enjoy to manage and control the proceedings to intervene to protect this right, especially where, as here, the prosecution was subjected to the same rules" ¹⁹⁷

The court then turned to the issue of whether the race-neutral justifications offered by the defense in *Williams* showed discriminatory intent or should have been believed. On appeal, a trial court's fact finding on such matters is accorded "great deference" by the appellate court. ¹⁹⁸ After review of the reasons given for excusing four of the jurors, the court was unable to conclude that defense counsel had given the "sufficiently clear and reasonable specific explanation[s]" required to overcome the great deference afforded to the trial court's findings. ¹⁹⁹

The court, in exercise of its supervisory responsibilities, adopted a procedure to be followed for all cases tried after *Williams* was certified. Concluding that the interests of the state and a criminal defendant are weightier than the interest of a potential juror, the court held that "absent extraordinary circumstances a trial court should not require each side to present a race-neutral justification for each of its peremptory challenges." ²⁰⁰ Trial courts should wait for an objection, and sua sponte intervention "is only authorized when a prima face case is abundantly clear with respect to a particular juror." ²⁰¹

In *Currin*, the supreme court reversed a robbery conviction because the trial court rejected a sufficiently race-neutral reason for the exercise of a peremptory challenge. ²⁰² In that case, an African-American defendant sought to peremptorily strike the only African-American juror on the venire. ²⁰³ His proffered race neutral explanation was "that the juror had previously served on a criminal jury, had voted for conviction, and had been frustrated by that jury's inability to reach a verdict." ²⁰⁴ The court found that this explanation was "sufficiently clear and reasonably specific," and that the trial court committed reversible error in failing to grant the peremptory strike based on this justification. ²⁰⁵

D. Sentencing

During the past year, the Indiana appellate courts considered sentencing in three different and significant contexts: mandatory sentences; enhanced sentences; and probation. In *Person v. State*, ²⁰⁶ the Indiana Court of Appeals considered, as an issue of first impression, whether requiring a mandatory executed sentence for

197. *Id.*

198. *Id.* at 1380 (citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991)).

199. *Id.* at 1381.

200. *Id.* at 1382.

201. *Id.*

202. *Currin v. State*, 669 N.E.2d 976 (Ind. 1996).

203. *Id.* at 977.

204. *Id.* at 979.

205. *Id.*

206. 661 N.E.2d 587 (Ind. Ct. App. 1996), *trans. denied*.

a conviction for dangerous possession of a handgun²⁰⁷ violated the privileges and immunities clause of the Indiana Constitution.²⁰⁸ Person, then seventeen years old, was the sole back seat passenger of a car that was pulled over by the police. After ordering Person to exit the vehicle, the officer found a handgun sticking out of the rear seat.²⁰⁹ The trial court found Person guilty of dangerous possession of a handgun and sentenced him to sixty days with fifty-five of those days suspended.²¹⁰ The five-day executed sentence was in accordance with a statutory mandatory minimum sentence for the offense.²¹¹

On appeal, Person challenged the constitutionality of his sentence on several grounds. First, he argued the statutes under which he was convicted and sentenced violated article I, sections 16²¹² and 18²¹³ of the Indiana Constitution,²¹⁴ which protect against disproportionate penalties and vindictive justice, respectively. Second, he argued that his sentence violated the privileges and immunities clause of the Indiana Constitution. In finding no constitutional violations, the court noted that “penal sanctions are primarily legislative considerations and judicial review . . . is very deferential.”²¹⁵ Because the juvenile justice system is focused upon the care, treatment and rehabilitation of the wayward child, a mandatory five-day jail sentence may be a powerful and constitutional tool toward that end.²¹⁶

On the issue of privileges and immunities, the court considered the dangerous possession of a handgun by a child statute alongside the statute prohibiting adults from carrying a handgun without a license.²¹⁷ Person noted that the crime of

207.

A child who knowingly, intentionally, or recklessly: (1) possesses a firearm for any purpose other than a purpose described in section 1 of this chapter; or (2) provides a firearm to another child with or without remuneration; commits dangerous possession of a firearm, a Class A misdemeanor.

IND. CODE § 35-47-10-5 (Supp. 1996).

208. “[T]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” IND. CONST. art. I, § 23.

209. *Person*, 661 N.E.2d at 590.

210. *Id.* at 589.

211. “In addition to any criminal penalty imposed for an offense under this chapter, the court shall order incarceration for five (5) consecutive days in an appropriate facility” IND. CODE § 35-47-10-8 (Supp. 1996).

212. “All penalties shall be proportioned to the nature of the offense.” IND. CONST. art. I, § 16.

213. “The penal code shall be founded on the principles of reformation, and not of vindictive justice.” *Id.* § 18.

214. *Person*, 661 N.E.2d at 590.

215. *Id.* at 593.

216. *Id.*

217. *Id.* at 592-93. “Except as provided in section 2 of this chapter, a person shall not carry a handgun in any vehicle or on or about his person, except in his dwelling, on his property or fixed

carrying a handgun without a license can be committed by either an adult or a child, while dangerous possession of a handgun can only be committed by a child, yet the penalty for the latter is more severe than for the former.²¹⁸ He asserted that this was a violation of the privileges and immunities clause because juveniles are subjected to a more severe penalty than are adults.²¹⁹ The court noted at the outset, however, that a juvenile will not necessarily be treated more harshly than an adult, because the five days is merely a minimum.²²⁰

A claimed violation of privileges and immunities is evaluated under a two-prong test. The test was set forth in *Collins v. Day*²²¹ as follows:

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.²²²

As noted above, there is a strong presumption of validity, and one challenging a statute carries a very heavy burden. As to the other considerations, the court noted that "legislative classification becomes a judicial question only where the lines drawn are arbitrary or manifestly unreasonable."²²³ The court held that "the special classification of children is reasonably related to the subject-matter of the legislation" and reasonably related to its purpose, which is to deter children from possessing handguns.²²⁴ Finally, the second prong is satisfied because "the statutory scheme applies equally to all persons who are under age 18"²²⁵

In *Walker v. State*,²²⁶ the Indiana Supreme Court considered whether the crime of dealing in cocaine as a Class A felony²²⁷ requires proof that a defendant had actual knowledge that the sale was occurring within 1000 feet of a school.²²⁸ Walker was convicted of dealing in cocaine as a class A felony based on evidence

place of business, without a license issued under this chapter being in his possession." IND. CODE § 35-47-2-1 (1993).

218. *Person*, 661 N.E.2d at 591. An individual convicted of Carrying a Handgun without a License, a Class A misdemeanor can be sentenced to up to 365 days in jail. There is, however, no statutory minimum sentence.

219. *Id.*

220. *Id.*

221. 644 N.E.2d 72 (Ind. 1994).

222. *Id.* at 80.

223. *Person*, 661 N.E.2d at 593 (quoting *Collins*, 644 N.E.2d at 80).

224. *Id.*

225. *Id.*

226. 668 N.E.2d 243 (Ind. 1996).

227. IND. CODE § 35-48-4-1 (Supp. 1996).

228. *Walker*, 668 N.E.2d at 243.

that he had sold \$20 worth of crack cocaine within 1000 feet of a school.²²⁹

The statute provides: "(a) A person who: (1) Knowingly or intentionally . . . (C) Delivers . . . cocaine . . . commits dealing in cocaine, a Class B felony."²³⁰ The offense is elevated to a Class A felony, however, if the person "[d]elivered . . . the drug in or on school property or within one thousand (1,000) feet of school property or on a school bus."²³¹ Walker argued that permitting enhancement to a Class A felony without requiring proof of knowledge that the transaction occurred within 1000 feet of a school violates the due process requirement that a conviction rest on proof of each element of a charged crime.²³²

The court framed the issue as "whether the legislature meant to impose liability without fault or, on the other hand, really meant to require fault, though it failed to spell it out clearly."²³³ The court reaffirmed its approval of the seven factors found in the *LaFave and Scott* hornbook which are to be weighed in deciding the issue.²³⁴ Chief Justice Shepard, writing for a three-member majority, held that the weight of the factors failed to support contention that the Indiana General Assembly intended to require separate proof of knowledge of his proximity to a school.²³⁵ Moreover, the majority quoted Judge Staton's pragmatic words that "a dealer's lack of knowledge of his proximity to the schools does not make the illegal drug any less harmful to the youth in whose hands it may eventually come to rest."²³⁶

In dissent, Justice DeBruler began with the proposition that "the statutory language is the primary guide in determining the Legislature's intent."²³⁷ The statutory language cited above raises the question of whether the "knowingly and intentionally" language modifies only the term "delivers" or all elements of the offense, including the elevating element of delivery within 1000 feet of a school.²³⁸ Justice DeBruler also quoted a separate statute which provides "unless the statute defining the offense provides otherwise, if a kind of culpability is required for the commission of the offense, it is required with respect to every material element of the prohibited conduct."²³⁹ Finally, he noted that "the rule of lenity requires that criminal statutes be strictly construed against the State."²⁴⁰ Because the State made

229. *Id.*

230. IND. CODE § 35-48-4-1.

231. *Id.*

232. *Walker*, 668 N.E.2d at 244. *See also In re Winship*, 397 U.S. 358 (1970).

233. *Walker*, 668 N.E.2d at 244 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.8, at 342-44 (1986)).

234. *Id.*

235. *Id.*

236. *Id.* at 244-45 (DeBruler, J., dissenting) (citing *Williford v. State*, 571 N.E.2d 310, 313 (Ind. Ct. App. 1991)).

237. *Id.* at 245 (citing *State ex rel. Roberts v. Graham*, 110 N.E.2d 855 (Ind. 1953)).

238. *Id.*

239. *Id.* (citing IND. CODE § 35-41-2-2(d) (1993)).

240. *Walker*, 668 N.E.2d at 246 (DeBruler, J., dissenting) (citing *Bond v. State*, 515 N.E.2d 856, 857 (Ind. 1987)).

no showing at trial that Walker knew his distance from the school, Justice DeBruler would have remanded the case for sentencing as a Class B felony.²⁴¹

In *Johnson v. State*,²⁴² the Indiana Court of Appeals considered the setting of probation conditions for an anti-abortion protester convicted of the misdemeanor offenses of obstructing pedestrian traffic and criminal trespass. Johnson was part of a group of individuals who blocked access to a Merrillville Planned Parenthood Clinic to prevent employees and patients from entering.²⁴³ She was convicted of misdemeanor charges and placed on probation.²⁴⁴ On appeal, she argued that the probation term requiring her to attend a reproductive health lecture sponsored by Planned Parenthood violated her First Amendment religious rights under the Establishment and Free Exercise Clauses.²⁴⁵

The court noted that probation is a “matter of grace and . . . not a right,” thus a trial court is given “broad discretion in establishing conditions of probation.”²⁴⁶ To that end, “conditions of probation which intrude upon constitutionally protected rights are not necessarily invalid.”²⁴⁷

In evaluating Johnson’s Establishment Clause claim, the court considered the three-prong *Lemon* test.²⁴⁸ Because Planned Parenthood was a purely secular organization which did not inquire into the religious faith of its clients, the court found that it did not favor one religion over another or favor the non-existence of religion.²⁴⁹ Similarly, the court dispensed with Johnson’s Free Exercise claim by noting that the defendant was not singled out for special hostility based on her religious beliefs, but rather the trial court action was motivated by non-religious deterrence.²⁵⁰ Finally, in upholding the propriety and constitutionality of the lecture requirement, the court noted that the requirement was not meant to alter Johnson’s religious beliefs or stance on the abortion issue, but was rather designed to apprise her of the variety of services—above and beyond abortion—offered by Planned Parenthood.²⁵¹

E. Death Penalty

241. *Id.* at 247.

242. 659 N.E.2d 194 (Ind. Ct. App. 1995).

243. *Id.* at 196.

244. *Id.* at 197.

245. U.S. CONST. amend. I.

246. *Id.* at 198 (citing *Million v. State*, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995)).

247. *Id.* at 199 (citing *Patton v. State*, 580 N.E.2d 693, 698 (Ind. Ct. App. 1991)).

248. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). State action does not violate the Clause if it 1) has a secular purpose, 2) does not have as its primary or principle effect the advancement or inhibition of religion, and 3) does not foster excessive entanglement with religion. *Id.*

249. *Johnson*, 659 N.E.2d at 199.

250. *Id.* at 200.

251. *Id.*

In *Schiro v. State*,²⁵² the Indiana Supreme Court considered whether, through a petition for post-conviction relief, a defendant sentenced to death was entitled to the review of his sentence under a judicial approach to death penalty appeals adopted after his direct appeal. In 1981, Schiro was charged with intentional murder and felony murder, i.e. killing while raping or attempting to rape his victim, in Vanderburgh County.²⁵³ He was granted a change of venue to Brown County, where a jury convicted him on the felony murder charge but not on the charge of intentional murder.²⁵⁴ The State had sought the death penalty by alleging that Schiro had intentionally killed his victim,²⁵⁵ but the jury returned a recommendation that the death penalty not be imposed.²⁵⁶ However, at a sentencing hearing two weeks later the trial judge sentenced Schiro to death.²⁵⁷

On direct appeal, the Indiana Supreme Court had considered Schiro's contention that a stricter standard of review should be used when the trial court imposed the death penalty over the unanimous recommendation of a jury against it.²⁵⁸ The supreme court held that it would not apply a different standard and that the death sentence was appropriate in this case.²⁵⁹ In addition to Schiro's direct appeal, the Indiana Supreme Court had considered his case on two other occasions—denying his petitions for post-conviction relief both times.²⁶⁰

After the denial of his second petition for post-conviction relief, the supreme court decided two cases which changed the standard of review for death penalty cases. In *Martinez Chavez v. State*,²⁶¹ the supreme court required that a trial judge make an express response to a jury recommendation against death.²⁶² In *Roark v. State*,²⁶³ the court modified *Martinez Chavez* somewhat by retaining that approach only as an appellate requirement. Thus, during appellate review of a death sentence imposed by a judge over the recommendation of a jury, the court considers two separate issues: "1) whether the trial court sentencing statement demonstrates due consideration of the jury recommendation; and 2) whether this Court, upon independent reconsideration of a jury recommendation against death, nevertheless concludes that the death penalty is appropriate."²⁶⁴ Because Schiro had been denied review of his death sentence under the *Chavez/Roark* approach at the time of his direct appeal in 1983, the supreme court held that he was entitled

252. 669 N.E.2d 1357 (Ind. 1996).

253. *Id.* at 1358.

254. *Id.*

255. See IND. CODE § 35-50-2-9(b)(1) (Supp. 1996).

256. *Schiro*, 669 N.E.2d at 1358.

257. *Id.*

258. *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983).

259. *Id.* at 1058.

260. *Schiro*, 669 N.E.2d at 1358.

261. 534 N.E.2d 731 (Ind.), *modified*, 539 N.E.2d 4 (Ind. 1989).

262. *Id.*

263. 644 N.E.2d 556, 565 (Ind. 1994).

264. *Id.* (quoting *Roark v. State*, 644 N.E.2d 556 (1994)).

to review by that standard through his petition for post-conviction relief.²⁶⁵

In conducting that review thirteen years after his direct appeal, the supreme court considered two factors in particular. First, Schiro had been charged with both intentional murder and felony murder, but the jury found him guilty of felony murder only.²⁶⁶ Secondly, after the penalty phase, the jury deliberated only sixty-one minutes before unanimously recommending that the death penalty not be imposed.²⁶⁷ Based on these two factors, Justice DeBruler wrote "this record strongly supports the conclusion that after the prosecution exercised two separate, full, and fair opportunities to support its claim for the death penalty based upon the existence of the intent to kill, the jury unanimously found the claim unsubstantiated."²⁶⁸ The court also noted that the trial judge's decision was based in part on his "inferences of evil intent and malingering on the part of Schiro from his out of the presence of the jury observations of Schiro during the course of the trial."²⁶⁹ Finally, the court acknowledged that several days of mitigation evidence had been presented.²⁷⁰ This included evidence of Schiro's admission of involvement in the crime, his chronic substance abuse problem, his scarred childhood, his mental illness, his kindness when not on alcohol or drugs, and his youth.²⁷¹

After considering all of these factors, the supreme court held that "it may not be said that the facts available in the record support the conclusion that the death penalty is appropriate."²⁷² The court remanded the cause with instructions to grant the petition for post-conviction relief, set aside the death penalty, and impose a term of sixty years imprisonment.²⁷³

Chief Justice Shepard was the sole dissenter and began by noting "Thomas N. Schiro has been permitted to litigate against the penalty of death imposed on him for killing Laura Luebenhusen for the last fifteen years . . . [t]his determined litigation has finally paid off, as four judges of this Court have decided that Schiro should not die for his crime after all."²⁷⁴ He noted that the trial judge had found that Schiro intentionally killed his victim, and that the trial judge's finding was upheld by the supreme court on direct appeal.²⁷⁵ Moreover, the trial judge found no mitigating factors, but instead found aggravating ones.²⁷⁶ The aggravating factors included Schiro's extensive criminal history and admission that he had committed at least eighteen other rapes, as well as his display of contempt for

265. *Schiro*, 669 N.E.2d at 1358.

266. *Id.*

267. *Id.* at 1359.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 1360 (Shepard, C.J., dissenting).

275. *See id.* at 1361. *See also* *Schiro v. State*, 451 N.E.2d 1047, 1058 (Ind. 1983).

276. *See Schiro*, 669 N.E.2d at 1362 (Shepard, C.J., dissenting).

people and the law throughout his life.²⁷⁷

Chief Justice Shepard quoted the U.S. Supreme Court's endorsement of sentencing by a judge and not jury: "It would appear that judicial sentencing should lead, if anything to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced at sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."²⁷⁸ Based on his belief that the trial judge discharged his responsibility in sentencing Schiro and that the supreme court fulfilled its constitutional mandate in giving his sentence a thorough and individualized review, Chief Justice Shepard voted to uphold the death sentence.²⁷⁹

F. The Reasonable Doubt Instruction

In *Winegeart v. State*,²⁸⁰ the Indiana Supreme Court considered and upheld the constitutionality of a reasonable doubt instruction. Two of the justices concurred in the result, but did not agree with the conclusions of the majority regarding the instructions. However, the court recommended the use of a new reasonable doubt instruction.²⁸¹

The court first examined the constitutional challenge to the following instruction:

A reasonable doubt is such doubt as you may have in your mind when having fairly considered all of the evidence, you do not feel satisfied to a moral certainty of the guilt of the defendant. A reasonable doubt is a fair actual and logical doubt that arises in the mind as an impartial consideration of all the evidence and the circumstances in the case. It is not every doubt, however, it is a reasonable one. You are not warranted in considering as reasonable those doubts that may be merely speculative or products of the imagination, and you may not act upon mere whim, guess or surmise or upon the mere possibility of guilt. A reasonable doubt arises, or exists in the mind, naturally, as a result of the evidence or lack of evidence. There is nothing in this that is mysterious or fanciful. It does not contemplate absolute or mathematical certainty. Despite every precaution that may be taken to prevent it, there may be in all matters depending upon human testimony for proof, a mere possibility of error.

If, after considering all of the evidence, you have reached such a firm belief in the guilt of the defendant that you would feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you, than you have reached that degree of certainty which excludes reasonable doubt and authorizes conviction.

This rule on reasonable doubt applies to each of you individually, and

277. *Id.* at 1362-63.

278. *Id.* at 1363 (quoting *Proffitt v. Florida* 428 U.S. 242 (1976)).

279. *Id.*

280. 665 N.E.2d 893 (Ind. 1996).

281. *Id.*

it is your personal duty to refuse to convict as long as you have a reasonable doubt as to the defendant's guilt as charged. Likewise, it is your personal duty to vote for conviction as long as you are convinced beyond a reasonable doubt of the defendant's guilt as charged.²⁸²

Although the defendant did not make a timely objection to this instruction, the court examined the instruction to determine whether the giving of the instruction constituted fundamental error and thus denied the defendant a right to a fair trial.²⁸³ The court considered the due process protection "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"²⁸⁴ The court acknowledged that "[w]hile the federal constitution requires that juries be instructed 'on the necessity that the defendant's guilt be proven beyond a reasonable doubt,' it does not require the use of 'any particular form of words.'"²⁸⁵

The court then examined the reasonable doubt instructions approved by the U.S. Supreme Court in *Victor v. Nebraska*,²⁸⁶ which included the moral certainty language similar to that used in *Winegeart*. The court recognized the U.S. Supreme Court's language which said that "reasonable doubt occurs when, 'after consideration of all of the evidence,' the juror does not have 'an abiding conviction, to a moral certainty of the guilt of the accused.'"²⁸⁷ The supreme court then said that "in the context of the entire instruction, which explicitly directed the jurors to base their conclusion on the evidence of the case and not to engage in speculation or conjecture, the inclusion of the moral certainty language did not render the instructions unconstitutional."²⁸⁸

The Indiana Supreme Court compared the challenged language in *Winegeart* to that approved in *Victor* and found that the instruction in *Winegeart* contained

both significant differences from, and substantial similarities to, the instructions approved in *Victor*. The *Winegeart* instructions reference to "moral certainty" lacks the "abiding conviction" language noted in *Victor*. On the other hand, the "actual and substantial doubt" wording in the Nebraska instruction in *Victor* is similar to the "fair, actual, and logical doubt" phrase used in *Winegeart*'s trial. Moreover, the *Winegeart* jury was directed to base its decision on all the evidence; to disregard whim, guess, surmise, or mere possibility of guilt; and to consider the "hesitate to act" benchmark—all significant factors that the *Victor* court found significant.²⁸⁹

282. *Id.* at 895.

283. *Id.* at 895-96.

284. *Id.*

285. *Id.*

286. 511 U.S. 1 (1994).

287. *Winegeart*, 665 N.E.2d at 897 (citing *Victor*, 511 U.S. at 18).

288. *Id.*

289. *Id.* at 897 (citations omitted).

The Indiana Court of Appeals had rejected Winegeart's challenge to the "fair" and "actual" language used to define reasonable doubt but "found constitutional error because the prominently placed, first substantive sentence of the definition in the instruction equated reasonable doubt with moral certainty"²⁹⁰ In reversing the trial court, the appellate court followed the reasoning in *Cage v. Louisiana*²⁹¹ in finding that the use of the phrase "moral certainty" *may have* allowed the jury to define guilt based upon a degree of proof below that required by the Due Process Clause.²⁹² The Indiana Supreme Court acknowledged that the U.S. Supreme Court had changed the standard since *Cage* and that the appropriate inquiry "is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it."²⁹³ The Indiana Supreme Court accepted the reasoning in *Victor* and stated that

there is not a reasonable likelihood that the jurors who determined the defendant's guilt applied the instruction in a way that violated the Due Process Clause. Thus the giving of this instruction would not have constituted error even if a timely and proper objection would have been made at trial. When there is no error, *ipso facto*, there is no fundamental error.²⁹⁴

The court then described its displeasure with the continued use of this instruction and stated,

The instruction uses 300 words in eleven sentences to explain reasonable doubt. This is not atypical for the reasonable-doubt instructions, which often appear to be a conglomeration of phrases providing supplemental or alternative explanation of reasonable doubt . . . most reasonable doubt instructions commonly in use in our courts today have not been crafted for the purpose of most effectively explaining the concept of reasonable doubt to jurors but rather are used primarily because the language therein is considered adequate to avoid appellate reversal.

As courts utilize such longer, more intricate explanations of reasonable doubt, juries are likely to draw an overall impression which may transcend the literal meaning of the substance of the words.²⁹⁵

The court went on to examine other jurisdictions to see how they handled the instruction²⁹⁶ and examined research to determine whether juror understanding of

290. *Id.*

291. 498 U.S. 39 (1990) (per curiam).

292. *Winegeart*, 665 N.E.2d at 897.

293. *Id.* (citing *Victor*, 511 U.S. at 6).

294. *Id.* at 898

295. *Id.*

296. *Id.* at 898-99 (citing *United States v. Headspeth*, 852 F.2d 753, 755 (4th Cir. 1988); *Kansas v. Larkin*, 498 P.2d. 37, 39 (Kan. 1972)).

the concept of reasonable doubt was enhanced after hearing instructions.²⁹⁷ The court acknowledged that research suggests that jurors have less difficulty understanding instructions that “have been rewritten in light of psycholinguistic principles.”²⁹⁸ The court agreed that “the phrase reasonable doubt may suffice without further explication and that many attempts to provide effective additional explanation have fallen short. However, we are not convinced that the task is impossible”²⁹⁹

The court looked at the Indiana Pattern Jury Instruction 1.15 which states,

A reasonable doubt is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based on reason and common sense and not a doubt based upon imagination or speculation.

To prove the defendant’s guilt of the elements of the crime charged beyond a reasonable doubt, the evidence must be such that it would convince you of the truth of it, to such a degree of certainty that you would feel safe to act upon such conviction, without hesitation in a matter of the highest concern and importance to you.³⁰⁰

The court expressed concern over the “hesitate to act” language believing that, although it would survive a constitutional challenge, “use of this analogy is neither required nor particularly desirable in explaining the concept of reasonable doubt.”³⁰¹

The court examined the Federal Judicial Center’s instruction which focuses on the “positive concept” of proof beyond a reasonable doubt.³⁰² That instruction states,

[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government’s proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law

297. *Id.* at 899 (citing Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC’Y REV. 153, 180 (1982); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 J.L. REFORM 401, 414-16 (1990)).

298. *Id.* at 900.

299. *Id.*

300. *Id.* at 901 (quoting INDIANA PATTERN JURY INSTRUCTION NO. 1.15 (2d ed. 1991)).

301. *Id.* at 902.

302. *Id.*

does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you [should] find [him/her] guilty. If on the other hand, you think there is a real possibility that [he/she] is not guilty, you [should] give [him/her] the benefit of the doubt and find [him/her] not guilty.³⁰³

The Indiana Supreme Court then authorized and recommended the future use of this instruction, but acknowledged that because two of the members of the court preferred the Indiana Pattern Instruction, its use in future cases was not mandated.³⁰⁴ Justice DeBruler joined by Chief Justice Shepard wrote a concurring opinion in which they stated that they “[did] not believe that ‘firmly convinced’ equate[d] to ‘beyond a reasonable doubt.’ Both objectively and subjectively, ‘firmly convinced’ seem[ed] more similar to ‘clear and convincing’ than to ‘beyond a reasonable doubt,’” and therefore they [found] that the Indiana Pattern Jury Instruction is “more than adequate.”³⁰⁵

303. *Id.* (quoting FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTION NO. 21 (1987)).

304. *Id.*

305. *Id.* at 905.

DEVELOPMENTS IN INDIANA EMPLOYMENT LAW

KELLY A. EVANS*

INTRODUCTION

Is Indiana still an employment-at-will state? When does the Indiana Statute of Frauds invalidate an oral employment contract? Does the National Labor Relations Act trump the Americans With Disabilities Act? This Article will focus on the foregoing labor and employment law questions which were addressed by Indiana state and federal courts during the survey period.

I. EMPLOYMENT-AT-WILL IS ON LIFE SUPPORT

Indiana continues to follow “the doctrine of employment at will, under which an employment relationship may be terminated by either party at will, with or without reason.”¹ However, the numerous exceptions to Indiana’s employment-at-will doctrine combine arguably to nullify the doctrine. These exceptions to the doctrine can be categorized broadly as public policy exceptions,² contractual exceptions,³ and statutory exceptions.⁴ Because the Indiana General Assembly has

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1. *Wior v. Anchor Indus., Inc.*, 669 N.E.2d 172, 175 (Ind. 1996) (citations omitted).

2. *See Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (recognizing employment-at-will exception where employee is discharged for exercising statutory right to file workers’ compensation claim); *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988) (recognizing exception to employment-at-will where employee is discharged for refusing to violate statutory duty to which the employee could be held personally liable). In *Wior*, the supreme court refused to expand the *Frampton* exception to protect managerial employees “who are themselves discharged for refusing to terminate subordinate employees with worker’s compensation claims.” *Wior*, 669 N.E.2d at 177.

3. *See Romack v. Public Serv. Co.*, 511 N.E.2d 1024 (Ind. 1987) (*see infra* notes 13-15 and accompanying text); *Jarboe v. Landmark Community Newspapers, Inc.*, 644 N.E.2d 118 (Ind. 1994) (promissory estoppel claim available to an at-will employee, but the remedy is limited to damages actually resulting from the detrimental reliance and does not include altering the employment status from an at-will relationship to one which requires just cause for termination).

4. Although employment-at-will employers can discharge an employee for “any or no reason,” employers cannot discharge employees for a reason prohibited by statutory law. Furthermore, given the burden shifting method of proving discrimination claims, employers can in effect discharge an employee who is a member of a statutorily protected group only for legitimate, non-discriminatory, and well-documented reasons. For example, employers expose themselves to potentially significant liability if they discharge an employee for one of the following reasons: (1) protected concerted activity under the National Labor Relations Act (29 U.S.C. §§ 157-169 (1994)); (2) race, color, sex, religion, or national origin (42 U.S.C. § 2000e-2 (1994)); (3) age (age 40 or over) (29 U.S.C. §§ 623, 631(a) (1994)); (4) disability (42 U.S.C. § 12112 (1994)); (5) wage garnishment (15 U.S.C. § 304 (1994)); (6) filing safety complaints under the Indiana Occupational Safety and Health Act (IND. CODE § 22-8-1.1-38.1 (1993)).

been unwilling to enter the employment-at-will fracas, the Indiana Supreme Court has determined what remains of the doctrine. The court made its most recent decision affecting the employment-at-will doctrine in *Wior v. Anchor Industries, Inc.*⁵

A. Independent Consideration Required to Defeat Employment-At-Will

In *Wior*, the court confirmed that in Indiana where there is no enforceable argument to the contrary, an employer-employee relationship is terminable at the will of either party, with or without reason.⁶ The parties may, of course, convert their at-will employment relationship to one in which the employer must have good cause to terminate the employee.⁷ The court noted that, “[a]s a general rule, Indiana employment relationships are terminable at the will of either party. If an employee gives independent consideration for an employment contract, however, the employer may terminate the employee only for good cause without incurring liability for its action.”⁸

In *Wior*, the court recognized that it has previously “identified fact scenarios in which the employee’s act or forbearance might provide adequate independent consideration sufficient to support an employment contract terminable only for good cause.”⁹ Under Indiana law, an employee may provide adequate consideration to establish an employment contract by (1) giving up a competing business to accept employment,¹⁰ (2) conveying something of value to the employer in exchange for employment,¹¹ or (3) releasing the employer from liability on a personal injury claim.¹²

Furthermore, in *Romack v. Public Service Co.*,¹³ the supreme court held that Romack demonstrated adequate independent consideration to establish an employment contract which required cause to terminate his employment where Romack:

- (1) was uniquely qualified for the position he filled with the employer by reason of his twenty-five years of training with the Indiana State Police, including his training in nuclear accident, SWAT team, bomb disposal, and similar security procedures;
- (2) had “lifetime employment” with the Indiana State Police;
- (3) was recruited by the employer to fill a position uniquely requiring a person possessing precisely the skills and abilities he had developed over his twenty-five years with the Indiana State Police;

5. 669 N.E.2d 172 (Ind. 1996).

6. *Id.* at 175.

7. *Id.* (citations omitted).

8. *Id.* (citations omitted).

9. *Id.*

10. *See Ohio Table Pad Co. v. Hogan*, 424 N.E.2d 144, 146 (Ind. Ct. App. 1981).

11. *See Mt. Pleasant Coal Co. v. Watts*, 151 N.E. 7 (Ind. App. 1926) (en banc).

12. *See Toni v. Kingan & Co.*, 15 N.E.2d 80 (Ind. 1938).

13. 511 N.E.2d 1024 (Ind. 1987).

(4) advised the employer that he would leave his present position only if the new job offered the same permanency of employment, advancement and benefits; and

(5) was told by the employer that he would have “permanent employment” if he accepted work with the employer.¹⁴

The court held that an employee is not an at-will employee if the employer knew the employee had a job “with assured permanency (or assured non-arbitrary termination policies),” and the employee only accepted the new job upon receiving assurances from the new employer guaranteeing similar job protection and termination policies.¹⁵

However, the *Wior* court recognized that:

[t]he acts and actions involved in moving one’s household to a new location, while sufficient to constitute consideration for an agreement to provide moving allowances or expenses, will not constitute independent consideration to support a contract of permanent employment so as to impose the requirement of good cause upon the right to terminate the employee.¹⁶

Furthermore, an employee’s relinquishment of an “existing job, business, or profession, without more,” will not result in a termination-for-good-cause relationship.¹⁷

[T]he reason for this view is that in moving and/or giving up her prior job, the employee is merely placing herself in a position to accept the new employment. There is no independent detriment to the employee because she would have had to do the same things in order to accept the job on any basis, and there is no independent benefit bestowed upon the employer.¹⁸

Generally, where an employee pursues employment, and no other compelling consideration exists, the employment relationship will be at-will and terminable by either party for any or no reason.¹⁹

In *Wior*, the employee contended that he provided adequate independent consideration to convert his at-will employment relationship to one requiring good cause for discharge.²⁰ He “relocated himself and his family to Evansville, agreed to subject himself to dismissal should he do work for a competitor, and gave up

14. *Romack*, 511 N.E.2d 1024, 1026 (Ind. 1987) (adopting and incorporating *Romack v. Public Serv. Co.*, 499 N.E.2d 768, 776-77 (Ind. Ct. App. 1986) (Conover, J., dissenting)).

15. *Romack*, 499 N.E.2d at 778 (Conover, J., dissenting).

16. *Wior*, 669 N.E.2d at 176 (quoting *Ohio Table Pad Co.*, 424 N.E.2d at 146).

17. *See id.*

18. *Id.* (quoting *Ohio Table Pad Co.*, 424 N.E.2d at 146).

19. *See id.* (citing *Ohio Table Pad Co.*, 424 N.E.2d at 147).

20. *Id.* at 176.

a business with good prospects for the future.”²¹ Additionally, the employee contended that “there was mutuality of obligation in that, just as Anchor could not terminate him, he could not quit the job.”²²

The Indiana Supreme Court concluded that Wior did not give his employer adequate independent consideration to create an employment contract.²³ Wior had been in business for only a short time, realizing relatively limited income and profits, and he had been actively seeking other positions, including the position with Anchor.²⁴ The court was “not persuaded by Wior’s suggestion that Anchor somehow recruited him by placing a blind advertisement in a newspaper and inviting Wior for an interview.”²⁵ Acknowledging that Wior brought unique skills to his position, the court found that “this fact alone [did] not constitute adequate independent consideration for a permanent employment contract.”²⁶ The court concluded that “while Wior suffered some change in position in accepting the position with Anchor, any disadvantage stemming from this change did not rise to that level of independent consideration necessary to [establish an employment contract] requir[ing] cause for termination.”²⁷

The supreme court’s decision in *Wior* leaves Indiana employees, employers, and their attorneys knowing only that the facts in *Romack* were sufficient to establish independent consideration for an employment contract, while the facts in *Wior* were not. Although the *Wior* decision did not specifically expand the *Romack* “independent consideration employment contract” exception to the employment-at-will doctrine, it did state that the *Romack* facts were not a “strict recipe” for independent consideration necessary to establish an enforceable employment contract. Stated otherwise, the supreme court has left the door open to find “independent consideration” sufficient to form an enforceable employment contract whenever the courts determine that the facts are “compelling.”²⁸

The uncertainty brought about by the *Wior* and *Romack* cases should lead employers to be cautious about any representations they make to potential employees. In addition, if an employer intends an at-will employment relationship, employers should require every employee to expressly acknowledge, in writing, that the employee is an at-will employee.²⁹ Likewise, an employee should insist that the employer put the termination-for-cause-only status in writing if that is the employment relationship the employee intends. Therefore, while the *Wior* decision leaves the breadth of the contractual employment-at-will exception

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 177.

27. *Id.*

28. *Id.*

29. Employers typically have employees acknowledge their employment-at-will status by signing at-will “disclaimer” statements contained in the employer’s employment application and/or employee handbook receipt.

in question, employees and employers should remember that clarity and certainty concerning their employment relationship is best secured through carefully drafted statements of the parties' intent.

B. Employee Handbooks Can Produce Employment Contracts and Defeat the Employment-At-Will Status of Employees

In *Orr v. Westminster Village North, Inc.*,³⁰ the Indiana Court of Appeals may have further restricted the employment-at-will doctrine when it expanded the right of terminated employees to attack the employment-at-will doctrine based on the theory that an employee handbook can form terms of an enforceable employment agreement between the employer and employee. In *Orr*, the employer adopted an employee handbook which included provisions for job security and promotion, a progressive discipline system, and a grievance procedure to challenge disciplinary actions.³¹ Like most employers, Westminster issued the handbook to all new employees who had to sign "receipts" indicating that they had read the handbook.³² In *Orr*, three employees who were fired for misconduct, filed a lawsuit alleging that their discharges breached their employment contracts.³³

The terminated employees argued that the handbook was part of their employment contracts.³⁴ The employees contended that these contracts were breached when their employer fired them without following the discipline and grievance procedures outlined in the handbook.³⁵ They further contended that they could only be discharged for the offenses described in the handbook and only in strict conformity with the handbook's grievance procedures.³⁶ The employer maintained that the handbook was not an employment contract and that the employees were at-will employees who could be discharged without cause.³⁷

In *Orr*, the court held that an employee handbook can become part of the employment contract between an employer and its employees if the employees "reasonably relied upon it as a term of their employment when they began work."³⁸ The court adopted a three-part test to make this determination: (1) "the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer had been made"; (2) "the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer"; and (3) "the employee must accept the offer by commencing or continuing to work after learning of the policy

30. 651 N.E.2d 795 (Ind. Ct. App. 1995), *trans. granted*, (Ind. Jan. 31, 1996).

31. *Id.* at 797.

32. *See id.*

33. *Id.*

34. *Id.* at 798.

35. *Id.* at 799.

36. *Id.*

37. *Id.*

38. *Id.* at 801.

statement.”³⁹

The *Orr* court circumvented the “independent consideration” issue addressed in *Romack* and *Wior*,⁴⁰ by determining that the evidence supported the employees contentions that they had performed their part of the employment agreement in reliance on the employer’s promises contained in the employee handbook.⁴¹ Accordingly, the court concluded the employees could have an enforceable unilateral contract regardless of whether the employees had provided adequate independent consideration for an employment contract under *Romack*.⁴² Therefore, under *Orr*, an employee who begins to work for an employer, in reliance on the promises of the employer, can have an enforceable employment contract. *Orr* is written so broadly that almost every employer who has any sort of employment handbook or policy which restricts the employer’s disciplinary or termination decisions could be subject to an *Orr* type claim.⁴³

The Indiana Supreme Court granted transfer in *Orr* and heard oral argument in February 1996. As of the writing of this Article, the supreme court has not issued its decision in *Orr*. If the *Orr* decision is not overturned or severely restricted, Indiana’s employment-at-will doctrine will lose much of its impact on Indiana employment law.

C. At-Will Employers Must Exercise Good Faith and Fair Dealing

In *Weiser v. Godby Bros.*, the Indiana Court of Appeals further weakened employment-at-will doctrine when it apparently imposed a “good faith and fair dealing” duty on employers who employ at-will employees.⁴⁴ The court held that Indiana employers are under a duty to exercise good faith and fair dealing when revising terms and conditions for employee compensation.⁴⁵ In *Weiser*, the employer allegedly told the employee to sign a new sales commission contract “or clean out your desk and you will be fired.”⁴⁶ The employee claimed he was under the impression that he would not be paid \$5000 of his previously earned commissions if he refused to sign the contract regarding future commissions.⁴⁷

The court held that even if the employee was an at-will employee, the sales

39. *Id.*

40. *See supra* notes 13-29 and accompanying text.

41. *Orr*, 651 N.E.2d at 800-01.

42. *Id.*

43. The *Orr* court did not address whether the employee handbook at issue contained an employment-at-will disclaimer, or whether such a disclaimer would be sufficient to prevent an employee from relying on the handbook under the court’s previously noted three part test.

44. 659 N.E.2d 237 (Ind. Ct. App. 1996), *trans. denied*.

45. *Id.* at 239-40 (citing *Prudential Ins. Co. v. Crouch*, 606 F. Supp. 464 (S.D. Ind. 1986), *aff’d*, 796 F.2d 477 (7th Cir. 1986)).

46. *Id.* at 239.

47. *Id.* This contract excused the employer from paying commissions after the employee’s termination.

commission contract was subject to the good faith and fair dealing requirement.⁴⁸ Therefore, if the contract was the result of undue influence and bad faith (a question for the trier of fact), it could be unenforceable. Although the decision does not directly impose a good faith and fair dealing limitation on the employer's right to discharge at-will employees, it nevertheless opens the door for employees to claim that employers must exercise good faith and fair dealing whenever the employer changes any term or condition of employment.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."⁴⁹ The *Weiser* court concluded that the foregoing concept was applicable to employment compensation contracts.⁵⁰ However, it left unanswered the question of whether other terms of an at-will employment relationship, that are not covered by a specific compensation agreement, will be subject to the good faith and fair dealing requirement. As such, this decision could lead employees to claim that employers have a general duty of good faith and fair dealing in an employment-at-will relationship. If Indiana courts agree with this position, then Indiana's employment-at-will doctrine will essentially cease to exist.

II. STATUTE OF FRAUDS ERASES ORAL EMPLOYMENT CONTRACTS

In *Wior v. Anchor Industries, Inc.*, the supreme court also addressed when employment contracts must be in writing in order to be enforceable.⁵¹ Indiana's Statute of Frauds invalidates

any agreement that is not to be performed within one (1) year from the making thereof . . . [u]nless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, excepting however, leases not exceeding the term of three (3) years.⁵²

In *Wior*, the employer assured the employee that the position offered was not a temporary one, but was a position in which the employee could work until a traditional retirement age, thus allowing him "20 plus" years with the employer.⁵³ The court of appeals held that the Statute of Frauds did not apply and, thus, a written contract was not required.⁵⁴ The court of appeals concluded that death was a contingency which renders a contract of lifetime employment fully performed

48. *Id.*

49. *Crouch*, 606 F. Supp. at 469 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)).

50. *Weiser*, 659 N.E.2d at 240.

51. 669 N.E.2d 172 (Ind. 1996).

52. IND. CODE § 32-2-1-1 (1993).

53. *Wior*, 669 N.E.2d at 173.

54. *Wior v. Anchor Indus., Inc.*, 641 N.E.2d 1275, 1278-79 (Ind. Ct. App. 1994), *vacated*, 669 N.E.2d 172 (Ind. 1996).

and the employee could have died within one year of entering into the contract with the employer.⁵⁵ Therefore, the court of appeals held that the employment contract was capable of being “performed” within one year and, thus, did not require a writing under the Statute of Frauds.⁵⁶

The supreme court reversed the court of appeals’ decision and concluded that the employer and employee understood that retirement in “20 plus” years would occur only at an age that the employee could not attain within one year, and therefore the Statute of Frauds required the agreement to be in writing.⁵⁷ The court further concluded that while death may serve as a contingency constituting full performance within one year “in a lifetime employment contract, death does not constitute [a possible] performance in contracts involving employment until retirement where the parties intend that the employee will retire only after a number of years greater than one.”⁵⁸

In *Wior*, the supreme court noted that if it were “to rule otherwise, the Statute of Frauds’ continued vitality in service contracts would be substantially eroded.”⁵⁹ The supreme court noted that “[u]nder the court of appeals’ analysis, any person with a service agreement intended to span a long period of time could avoid the writing requirement of the Statute of Frauds, since death could always occur within one year.”⁶⁰ The supreme court rejected “the analysis offered by the majority below as incompatible with the purposes of the Statute of Frauds [and declined] to interpret death as a contingency constituting performance in an agreement for employment” until retirement.⁶¹ The supreme court found that “*Wior*’s breach of contract claim [was] within the Statute of Frauds and because the contract was not reduced to writing, it was unenforceable.”⁶²

The points to remember in light of the holding in *Wior* are (1) that employment contracts for a period less than one year are enforceable even though they are not in writing; (2) that promises of employment for “life,” even if not in writing, are nevertheless enforceable since the risk of death may serve as a contingency constituting performance within one year; and (3) employment contracts greater than one year, or until retirement if the parties understand that retirement could not occur within one year, must be in writing to be enforceable under the Statute of Frauds.

III. NATIONAL LABOR RELATIONS ACT TRUMPS AMERICANS WITH DISABILITIES ACT

During the survey period, the Seventh Circuit affirmed the decision of the

55. *Id.* at 1278.

56. *Id.* at 1278-79.

57. *Wior*, 669 N.E.2d at 175.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

U.S. District Court for the Southern District of Indiana in *Eckles v. Consolidated Rail Corp.*⁶³ *Eckles* addresses the “important issue about the relationship between an employer’s duty of reasonable accommodation under the Americans with Disabilities Act (ADA) and its duty to comply with seniority systems established by collective bargaining.”⁶⁴

Before discussing the facts and decision of *Eckles*, a brief discussion of the applicable principles of the ADA⁶⁵ and National Labor Relations Act (NLRA)⁶⁶ is in order. Subchapter I of the ADA prohibits discrimination against a qualified individual with a disability in any of the terms, conditions, or privileges of employment.⁶⁷ The ADA’s definition of discrimination encompasses an employer’s failure to make “reasonable accommodations” for a qualified individual with a disability without demonstrating that an accommodation would impose an “undue burden” on the employer.⁶⁸

The ADA defines reasonable accommodations as including:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁶⁹

Although the above-quoted list of reasonable accommodations under the ADA is not exhaustive, “the specific reference in the statute to reassignment to a vacant position reflects a deliberate choice—Congress did not intend to require reasonable accommodation that would include ‘bumping’ other employees from positions they hold.”⁷⁰ However, “[t]he ADA likewise prohibits ‘discrimination’ defined as ‘participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity’s qualified applicant or employee with a disability to the discrimination prohibited under this subchapter.’”⁷¹

A basic principle of federal labor law is that an employer who violates a collective bargaining agreement may be challenged by an injured employee under the grievance and arbitration procedure of the collective bargaining agreement

63. 890 F. Supp. 1391 (S.D. Ind. 1995), *aff’d*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1318 (1997).

64. *Eckles*, 890 F. Supp. at 1394.

65. 42 U.S.C. §§ 12101-12219 (1994).

66. 29 U.S.C. §§ 151-169 (1994).

67. 42 U.S.C. § 12112(a).

68. 42 U.S.C. § 12112(b)(5)(A). *See also* Vande Zande v. Wisconsin Dep’t of Admin., 851 F. Supp. 353, 359 (W.D. Wis. 1994), *aff’d*, 44 F.3d 538 (7th Cir. 1995).

69. 42 U.S.C. § 12111(9).

70. *Eckles*, 890 F. Supp. at 1401.

71. *Eckles*, 94 F.3d at 1046 (quoting 42 U.S.C. § 12112(b)(2)).

and/or sued under section 301 of the Labor Management Relations Act.⁷² Therefore, if an employer violates the terms of its collective bargaining agreement, even if the violation results from the employer's attempt to comply with its obligations under the ADA, the employer exposes itself to a section 301 suit by the employee who was injured by the employer's breach of contract.

In *Eckles*, the employee "demanded certain 'reasonable accommodations' under the ADA for his epilepsy, which the parties agree would have required infringement of the seniority rights of other employees under the collective bargaining agreement."⁷³ Initially, the employer and union agreed to place the employee in a position that he was not entitled to under the seniority provisions of the parties' collective bargaining agreement to accommodate his disability.⁷⁴ Eckles was allowed to bump an employee with more seniority so that Eckles could work in a position that met his medical restrictions.⁷⁵ "In fact, because the ADA does not require 'bumping,' Conrail and the Union initially gave Eckles more accommodation than the ADA requires when they gave him a special placement under Rule 2-H-1."⁷⁶ However, the union rescinded its agreement allowing Eckles to be placed in a position to which he was not entitled under the seniority provisions of the collective bargaining agreement.⁷⁷ Consequently, Eckles was "bumped" from his position by a more senior employee under the terms of the agreement.⁷⁸

The first issue presented in *Eckles* is whether the ADA required the employer to provide Eckles with a "reasonable accommodation" that entailed a special job placement and job protection (against bumping) in violation of the bona fide seniority rights of other employees, when such accommodation was the only way Eckles could have returned to work.⁷⁹ Eckles also argued that his employer and union violated the ADA by participating in a contractual relationship that resulted in discrimination against Eckles because of his disability.⁸⁰ However, the court found that, to show that the contract between the employer and the union was unlawful discrimination, Eckles had to show that he was denied a reasonable accommodation—the only form of discrimination Eckles actually alleged.⁸¹

72. 29 U.S.C. § 185 (1994). In *Eckles*, the Labor Management Relations Act was not at issue because the employer was covered by the Railway Labor Act. However, as the Seventh Circuit noted, "the governing principles of the Railway Labor Act in this regard are not substantially different from those that apply under the National Labor Relations Act." *Eckles*, 94 F.3d at 1045 n.5.

73. *Eckles*, 94 F.3d at 1043.

74. *Id.* at 1043-44.

75. *Id.* at 1044.

76. *Eckles*, 890 F. Supp. at 1413.

77. *Eckles*, 94 F.3d at 1044.

78. *Id.*

79. *Id.* at 1045.

80. *Id.* at 1046.

81. *Id.* The court held that although it is true that an employer and union cannot enter into a contractual relationship, or manipulate same, to avoid their ADA duties, there was simply no

In addressing the first question presented by *Eckles* the court concluded, “[a]fter examining the text, background, and legislative history of the ADA duty of ‘reasonable accommodation,’ we conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees.”⁸²

Importantly, the court considered and rejected the position taken by the Equal Employment Opportunity Commission (EEOC), which filed an amicus brief in support of *Eckles*. The EEOC acknowledged that the ADA does not require “bumping” of another employee to accommodate a disabled employee.⁸³ However, the EEOC argued that employers and unions faced with the dilemma presented in *Eckles* have a duty to negotiate a variance from the collectively bargained seniority rules when the only available accommodation violated the seniority rules and other employees would not be unduly burdened by the variance.⁸⁴ The Seventh Circuit noted that the EEOC’s position was “admirable in its desire for moderation and compromise,” but rejected the EEOC’s position as lacking any foundation in the text or legislative history of the ADA.⁸⁵

Although the *Eckles* district and appellate court decisions are certainly well reasoned, and the EEOC’s position is not required by the ADA, it seems apparent that employers and unions may wish to consider negotiating possible accommodations which balance the needs of disabled employees with the seniority rights of other employees. By doing so, employers and unions can attempt to return disabled employees to work they can perform, while protecting legitimate rights of other employees.

CONCLUSION

During the survey period, Indiana’s courts continued to develop Indiana’s employment-at-will doctrine and its exceptions. The supreme court’s forthcoming decision in *Orr*,⁸⁶ and the courts’ development of the “good faith and fair dealing” requirement in *Weiser*,⁸⁷ could decide whether the employment-at-will doctrine still exists in Indiana. However, any attorney practicing employment law in Indiana should make certain that clients understand that the vitality of the employment-at-will doctrine has already been severely restricted by public policy, contractual, and statutory exceptions to the doctrine. Accordingly, employers

evidence that the collective bargaining agreement was established or administered in order to circumvent the ADA. *Id.*

82. *Id.* at 1051. The court emphasized that its conclusion was “limited to individual seniority rights and should not be interpreted as a general finding that all provisions found in collective bargaining agreements are immune from limitation by the ADA duty to reasonably accommodate.” *Id.* at 1052.

83. *Id.* at 1051.

84. *Id.*

85. *Id.*

86. 651 N.E.2d 795 (Ind. Ct. App. 1995), *trans. granted*, (Ind. Jan. 31, 1996).

87. 659 N.E.2d 237 (Ind. Ct. App. 1996).

should never prospectively rely on the employment-at-will doctrine when dealing with current or future employees.

The employment relationship in Indiana is highly regulated by state and federal governments. Furthermore, the laws concerning that relationship are subject to change at any time. For example, while the interaction between the ADA and NLRA was clarified by *Eckles*,⁸⁸ the ADA also has complex and illusive overlaps with the Family and Medical Leave Act (FMLA)⁸⁹ and Indiana's Workers' Compensation System⁹⁰ that certainly will be clarified by the courts in the near future. Stay tuned to your advance sheets.

88. 890 F. Supp. 1391 (S.D. Ind. 1995), *aff'd*, 94 F.3d 1041 (7th Cir. 1996).

89. 29 U.S.C. §§ 2611-2654 (1994).

90. IND. CODE §§ 22-3-1-1 to -3-12-5 (1993 & Supp. 1996).

RECENT DEVELOPMENTS UNDER THE INDIANA RULES OF EVIDENCE

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INTRODUCTION

This past year was the third year for the Indiana courts under the new regime of the Indiana Rules of Evidence, which took effect on January 1, 1994. Paralleling the two-decades-old Federal Rules of Evidence and similar rules adopted by many states, the Rules have effected a major dislocation of Indiana's prior approach to evidence questions. The courts have thus had to re-evaluate the rationales for their common-law decisions as part of the process of determining the extent of the changes made by the Rules. The cases that came before the courts during the time period covered by this survey required the courts to adopt new approaches to issues spanning the spectrum of evidence law. Although the adaptation to the new Rules can be expected to continue over the coming years, the Indiana courts have already begun to chart an independent path in their interpretations of the text of the Rules, departing in some significant ways from the approaches taken by the federal courts and by other state courts using analogous evidence rules.

This Article surveys the major developments in Indiana evidence caselaw during the past year, organized according to the corresponding Articles in the Indiana Rules of Evidence.

I. SCOPE—RULE 101

The Rules (other than those with respect to privileges) do not apply in "[p]roceedings relating to extradition, sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims, and grand jury proceedings."¹ Rule 101(c)(2) seems to leave open the question of how evidentiary questions are to be handled in the enumerated proceedings. In *Greer v. State*,² the Indiana Court of Appeals essayed an answer to that question, but in doing so raised a host of other questions that remain unresolved.

Greer involved an appeal from a revocation of probation. During the revocation hearing, Greer's probation officer was the principal witness. The probation officer testified that Greer's father had informed him that Greer had been consuming alcoholic beverages, a violation of the probation terms. The officer further testified that he had then spoken with Greer, and that Greer had admitted to drinking. Although this testimony was plainly hearsay,³ Greer's

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1. IND. R. EVID. 101(c)(2).

2. 669 N.E.2d 751 (Ind. Ct. App. 1996), *trans. granted*, No. 57S03-9610-CR-653 (Ind. Oct. 15, 1996).

3. Greer's statements to the probation officer were, of course, not hearsay because they were the statements of a party-opponent. IND. R. EVID. 801(d)(2)(A).

counsel failed to object, a failure that, Greer contended, denied him effective assistance of counsel.

The court acknowledged the argument that the Rules do not apply in probation revocation proceedings. The court concluded, however, that Rule 101(c)(2) did not mean that hearsay was admissible in such proceedings.⁴ Instead, the court referred to Rule 101(a), which states that if the Rules do not address a specific evidentiary issue, common law or statutory law shall apply.⁵ On the basis of this provision, the court concluded that the Rules did not evince an intent to eliminate all evidentiary rules in the proceedings enumerated in Rule 101(c)(2). The court then returned to its decision in *Payne v. State*,⁶ in which the court had concluded that probation revocation proceedings were in the nature of civil proceedings, and that probationers were entitled to the same protection from hearsay evidence as civil litigants.⁷

It is unclear to what extent the court's rationale can be extended beyond its precise holding. The court is in all likelihood correct that Rule 101(c)(2) should not be read to eliminate all limits on the kinds of evidence that may be presented in the enumerated proceedings. The decision should not be read, however, to mean that the full panoply of evidentiary limitations created by Indiana common law prior to the adoption of the Rules must be observed in these proceedings.⁸ Rather, Rule 101(a)'s exhortation to look to common law or statutory law probably should be read to require the courts to examine how the common law and statutory law treated the different types of proceedings listed in Rule 101(c)(2). In the particular issue that arose in *Greer*, the common-law rule had been that the protection from hearsay available to probationers was the equivalent of the protection available to civil litigants.⁹ But that does not mean that such hearsay evidence would be inadmissible in a sentencing proceeding,¹⁰ nor indeed does it mean that all evidence that is inadmissible in a civil case is similarly inadmissible in a probation revocation proceeding.¹¹ Each type of proceeding must be

4. *Greer*, 669 N.E.2d at 755.

5. *See id.*

6. 515 N.E.2d 1141 (Ind. Ct. App. 1987).

7. *Id.* at 1144.

8. Indeed, one would expect that the admonition that the Rules do not apply would extend, not limit, the admissibility of evidence in the typical case.

9. *See Payne*, 515 N.E.2d at 1144. In this treatment of probation proceedings, Indiana courts differ significantly from federal courts, which allow hearsay evidence to be presented in supervised release revocation proceedings provided that the evidence bears sufficient indicators of reliability. *See, e.g., United States v. Pierre*, 47 F.3d 241, 242 (7th Cir. 1995). The Federal Rules of Evidence, like the Indiana Rules, state that they do not apply in probation revocation proceedings. *See* FED. R. EVID. 1101(d)(3).

10. *See Kostopoulos v. State*, 654 N.E.2d 44, 47 (Ind. Ct. App. 1995) (citing *Dillon v. State*, 492 N.E.2d 661, 664 (Ind. 1986) (hearsay is admissible at sentencing)).

11. *See, e.g., Patterson v. State*, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995) (Although the general rule is that a court may not take judicial notice of a different case, even if before the same court and between related parties, this rule is not strictly applied in probation revocation

evaluated on its own to determine the scope of the evidentiary rules to be applied.¹²

II. CHARACTER EVIDENCE AND OTHER ACTS—RULES 404 AND 405

The use of character evidence and acts other than those directly implicated in a particular proceeding presents some of the most difficult issues raised under the Indiana Rules of Evidence. Particularly in criminal cases, evidence of character or other acts can have a powerful impact on the jury, inviting jurors to draw the “forbidden inference” that, because the defendant is a “bad person” or engaged in other wrongful acts, he must have committed the crime with which he is charged.¹³ Rule 404(a)(1) prohibits introduction of evidence concerning a criminal defendant’s character unless the defendant raises the issue himself. Rule 404(b) states that other acts are not admissible to prove a person’s character as a means of suggesting that the person acted in conformity with that character. The rule continues, however, that evidence of other acts “may . . . be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁴

A. Motive

In years past, the Indiana Supreme Court, mindful of the danger posed by widespread use of other acts evidence, has cast a skeptical eye on arguments that

proceedings.); *Henderson v. State*, 544 N.E.2d 507, 512-13 (Ind. 1989) (same).

12. See, e.g., *Rzeszutek v. Beck*, 649 N.E.2d 673, 681 (Ind. Ct. App. 1995), *trans. denied* (hearsay admissible in small claims proceedings).

13. *Hardin v. State*, 611 N.E.2d 123, 129 (Ind. 1993). At the time *Hardin* was decided, the Indiana Supreme Court had already adopted Rule 404(b) of the Federal Rules of Evidence, displacing Indiana’s common law approach to the admissibility of other acts evidence. See *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992).

14. IND. R. EVID. 404(b). The courts frequently refer to the rule allowing admission of other acts for purposes other than to prove character as an “exception.” See, e.g., *Johnson v. State*, 671 N.E.2d 1203, 1208 n.7 (Ind. Ct. App. 1996), *trans. denied*; *Bowen v. State*, 671 N.E.2d 1182, 1189 (Ind. Ct. App. 1996), *vacated*, 680 N.E.2d 536 (Ind. 1997); *Spires v. State*, 670 N.E.2d 1313, 1315 (Ind. Ct. App. 1996); *Poindexter v. State*, 664 N.E.2d 398, 398-99 (Ind. Ct. App. 1996); *Brown v. State*, 659 N.E.2d 652, 656 (Ind. Ct. App. 1995), *trans. denied*. See also *Stanage v. State*, 674 N.E.2d 214, 216 (Ind. Ct. App. 1996). Strictly speaking, this is incorrect—indeed, the Rule, if anything, provides for the general admissibility of other acts evidence, except when offered to show character in order to prove action in conformity therewith. See *Lay v. State*, 659 N.E.2d 1005, 1010 n.5 (Ind. 1995) (Sullivan, J.) (“Because Rule 404(b) only excludes evidence of prior bad acts when offered to show bad character or conformity therewith, it is, perhaps, mistaken to refer to a common scheme or plan ‘exception.’ . . . [T]he rule is generally inclusive.”). In practical terms, however, the usage makes sense; it places on the proffering party the burden of establishing the evidence’s admissibility. Given the danger that jurors will draw improper inferences from evidence of other acts, this allocation of burdens is appropriate. See *Harris v. State*, 597 A.2d 956, 961-62 (Md. 1991).

the evidence was proffered for a proper purpose. In particular, the court has held that, because intent is routinely at issue in criminal cases, the prosecution may use evidence of other acts to prove intent only where the defendant himself “goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent.”¹⁵ To conclude otherwise, the court reasoned, would allow the routine introduction of other acts evidence and raise the risk that jurors would frequently draw the “forbidden inference.”¹⁶ The court of appeals has gone further, holding that other act evidence may not be introduced for any of the purposes enumerated in Rule 404(b) unless the defendant has gone beyond denying the charged crime and affirmatively presents a claim contrary to the charge.¹⁷ Recently, however, in an extraordinary unanimous decision, the supreme court offered a broad interpretation of the motive “exception,” perhaps opening the door to the widespread use of other acts evidence.

In *Tompkins v. State*,¹⁸ defendant Stevan Tompkins, a white man, was charged with the brutal robbery and murder of an African-American. At trial, the prosecution offered testimony from several witnesses concerning Tompkins’ racism. Tompkins’ accomplice testified that Tompkins was “prejudiced,” and that he “like[d] to mess with black people.”¹⁹ One of Tompkins’ co-workers recounted Tompkins’ statement that he called a lane at his lakefront property “no nigger lane.”²⁰ And Tompkins’ onetime cellmate testified that Tompkins referred to the murder victim as a “nigger.”²¹

Acknowledging that Rule 404(b) does not permit other acts evidence to show character, the court addressed the prosecution’s argument that the contested evidence was relevant to the issue of motive.²² The court concluded that Tompkins’ use of the word “nigger” was irrelevant to that issue.²³ The court

15. *Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993). Although the court’s concern over the possibility of widespread use of other acts evidence is understandable, it must be acknowledged that it is difficult to derive the court’s interpretation from the text of Rule 404(b) itself.

16. *Id.*

17. *See Reynolds v. State*, 651 N.E.2d 313, 316 (Ind. Ct. App. 1995); *Bolin v. State*, 634 N.E.2d 546, 550 (Ind. Ct. App. 1994). Recently, the court of appeals reaffirmed this approach in *Sundling v. State*, 679 N.E.2d 988, 993 (Ind. Ct. App. 1997).

18. 669 N.E.2d 394 (Ind. 1996).

19. *Id.* at 396.

20. *Id.*

21. *Id.*

22. The admissibility of this evidence was, for the most part, contested only on appeal. Prior to the trial, Tompkins filed a motion in limine to exclude the testimony that he had referred to the lane on his lake property as “no nigger lane;” the trial court denied the motion. Tompkins did not renew his objection at trial, nor did he object to the testimony that he was “prejudiced,” “like[d] to mess with black people,” and used the word “nigger.” *Id.* Although the supreme court concluded that Tompkins had thereby waived his objections, it nevertheless addressed the merits of Tompkins’ appeal. *Id.* at 396 n.7. Unless fundamental error is involved, this election seems to contradict Rule 103(a)(1) which requires a “timely objection” to preserve error.

23. The court did not address the admission of the assertion that Tompkins was

determined, however, that the assertion that Tompkins “like[d] to mess with black people” did tend to make it more likely that Tompkins had a motive to kill his victim.²⁴ And the court concluded that the evidence of the sign reading “no nigger lane” at Tompkins’ property “demonstrated a desire to engage in violence against African-Americans at least in certain circumstances.”²⁵ The court therefore concluded that these pieces of evidence were relevant to the issue of motive; the court further concluded that the trial court did not abuse its discretion by holding that the probative value of this evidence outweighed the danger of unfair prejudice to the defendant.²⁶

The court’s reasoning is problematic in at least three respects. First, the court seemed to treat the accomplice’s statement that Tompkins “like[d] to mess with black people” as evidence of other acts, rather than as evidence of character. The lack of specificity about the manner in which Tompkins enjoyed “messing” with African-Americans, however, removes the evidence from the typical evidence of other acts—the evidence does not recount anything that Tompkins did at a particular time and place, but rather represents an assessment of Tompkins’ proclivities. This evidence at best straddles the line between pure character evidence barred by Rule 404(a) and other acts evidence. And, because the distinction between use of character to prove action in conformity therewith and use of character to prove motive for action is virtually impossible to maintain, the court’s decision to allow the admission of such evidence increases the likelihood that a jury will draw the inference prohibited by Rule 404(a).

Second, even if one were to accept that all the evidence was indeed other acts evidence, there is still the problem that its probative value—the extent to which it demonstrates a motive for murder—stems entirely from the fact that it shows Tompkins’ character, because Tompkins’ motive arose from his character. Under Rule 404(b), the state cannot argue that Tompkins did and said these things; therefore he is a racist; therefore he acted in conformity with his racist character when he murdered the victim. Why should the state then be able to argue that Tompkins did and said these things; therefore he is a racist; therefore he had a motive for murdering the victim; therefore he acted in accordance with his motive?

Third, and perhaps most troubling, the *Tompkins* decision paid inadequate heed to the racially-charged nature of the evidence the admission of which it permitted. As the supreme court acknowledged, courts will closely scrutinize any attempt to inject racial issues into a criminal proceeding.²⁷ Courts generally admit such evidence only in very unusual circumstances. Where the defendant’s racial

“prejudiced,” a statement that clearly went to Tompkins’ character rather than to any prior crimes, wrongs, or other acts. The court also did not discuss whether Tompkins’ reference to his victim as “nigger” was admissible insofar as it showed a specific dislike of the victim.

24. “On the other hand, we believe the trial court could reasonably find [the accomplice’s] statement that defendant liked to ‘mess’ with blacks to be evidence of motive for one could hardly imagine being messed with more than Berryhill was here.” *Id.*

25. *Id.*

26. *Id.* at 397-98.

27. *Id.* at 396.

motivation is an *element* of the offense, for example, evidence regarding that bias is admissible.²⁸ Evidence of racial animus also may be admitted to rebut a defendant's alibi where it undermines the believability of that alibi.²⁹ And courts have, in very limited circumstances, admitted evidence of racial animus to establish motive.³⁰ Indeed, in *Kimble v. State*,³¹ decided several months before *Tompkins*, the court of appeals upheld the admission of evidence of a defendant's membership in a racist organization to show motive for a robbery and felony murder committed with members of that organization.³²

Evidence of membership in a violent racist organization is, however, more closely tied to the issue of motive than is the more abstract and distant evidence of racial animus at issue in *Tompkins*. In *Kimble*, for example, there was evidence that the defendant committed the crime with other members of the organization,³³

28. See, e.g., *United States v. Dunnaway*, 88 F.3d 617, 619 (8th Cir. 1996) (holding that evidence of the defendant's use of racial epithets, belief that interracial relationships were wrong, and membership in a skinhead group was admissible in a prosecution for interference with a person's enjoyment of public facilities because of race); *United States v. McInnis*, 976 F.2d 1226, 1232 (9th Cir. 1992) (holding that evidence of the defendant's possession of swastikas and other racist materials was admissible where racial animus was an element of the charged offense). The courts should still treat this type of evidence very carefully. The evidence should not be of a general character, but should relate specifically to why the particular victim was chosen.

29. See, e.g., *State v. Grayson*, 546 N.W.2d 731, 736-37 (Minn. 1996) (concluding that evidence that the African-American defendant stated that he "hated" white women and referred to them as "bitches" was admissible to rebut the defendant's claim that he had been visiting the white, female murder victim socially). The *Tompkins* court cited *Grayson* for the proposition that evidence of racial bias was sometimes relevant, without focusing on the context of the *Grayson* decision. See *Tompkins*, 669 N.E.2d at 397. It is, of course, undisputable that evidence of *Tompkins*' racial bias was logically relevant to the broad issue of *Tompkins*' guilt. But sensitivity to the inflammatory nature of evidence relating to racial bias, when combined with the strictures of Rule 404, requires that the court carefully examine the fit between the proffered evidence and the purpose for which it is offered, to ensure that the evidence is legally relevant to an issue that is properly part of the case. Indiana has recognized the distinction between the logical relevance of character evidence and the legal relevance of that evidence. See *Lannan v. State*, 600 N.E.2d 1334, 1337 (Ind. 1992).

30. See, e.g., *O'Neal v. Delo*, 44 F.3d 655, 661 (8th Cir. 1995) (concluding that evidence of the defendant's membership in the Aryan Brotherhood, a racist prison organization, was admissible to show the defendant's motive for killing a black inmate). *O'Neal* should be read with caution; the court only decided that admitting that evidence against him did not deprive him of a fair trial.

31. 659 N.E.2d 182 (Ind. Ct. App. 1995), *trans. denied*.

32. *Id.* at 184-85.

33. *Kimble* is clearly distinguishable from *Tompkins*. The evidence in *Kimble* that the defendant "considered himself an 'official' member of the White Brotherhood, because he had committed a crime against the black race" does show racist character, but it also clearly shows a motive apart from his character, namely, a desire to become a full-fledged member of the group. Where the evidence raises the possibility of the jury drawing a permissible influence and an

that the victim was selected specifically because of her race, and that the defendant subsequently took pride in having committed a crime against an African-American.³⁴ Although the supreme court has eliminated the common law doctrine of *res gestae*, under which evidence of acts that formed part of an “uninterrupted transaction” with the charged offense was admissible,³⁵ it remains true that proximity in time of other acts, if otherwise admissible under Rule 404(b), to the charged offense may increase the probative value of the evidence and thus tip the scales of the Rule 403 test toward admissibility.

In *Tompkins*, in contrast, the evidence that Tompkins “like[d] to mess with black people” and had a racist sign on his lakefront property was tied to his offense only by the fact that his victim was African-American. The *Tompkins* decision thus appears not only to open the door to evidence linked to motive only in a very broad sense, but also to allow such evidence in the context of an accusation of racial animus. This accusation, more than most, invites the jury to draw the “forbidden inference” that because the defendant has a bad character³⁶ (and Tompkins was undeniably a despicable human being), the defendant committed the crime for which he stands accused.³⁷

impermissible influence, Rule 404(b) operates to admit the evidence, subject, of course, to Rule 403. See *Cliver v. State*, 666 N.E.2d 59, 62-63 (Ind. 1996).

34. *Kimble*, 659 N.E.2d at 185.

35. *Swanson v. State*, 666 N.E.2d 397 (Ind. 1996). It is interesting to note that in *Swanson*, the court rejected the defendant’s argument that evidence of what he did to the victim on the day of the murder was governed by Rule 404(b). The court stated, “The paradigm of such inadmissible evidence is a crime committed on another day in another place” *Id.* at 398. *Swanson* also provides a useful reminder to practitioners: a party on appeal may argue a different basis for the admissibility of evidence than it did at trial if that party won below. *Id.*

36. In *Tompkins*, the prosecution invited the jury to make just that inference. “[T]he prosecutor attempted to use the evidence of racial bias to urge the jury to convict, telling the jury that the defendant was the kind of a person who committed murder out of ‘hatred, prejudice, or just plain disrespect for human life.’” *Tompkins*, 669 N.E.2d at 398. One wonders whether the holding in this case can be squared with *Johnson v. State*, 665 N.E.2d 502 (Ind. 1995). In *Johnson*, the court reversed a conviction where the prosecution made a similar argument to the jury. *Id.* at 505.

37. Not every case involving evidence of other acts to prove motive is as difficult as *Tompkins*. In *Taylor v. State*, 659 N.E.2d 535 (Ind. 1995), for example, the defendant was accused of murdering the daughter of his longtime girlfriend. The prosecution offered evidence that the murder victim had filed charges of molestation, which had led to an indictment, against the defendant. The defendant argued that the evidence of the indictment was improper character evidence, but the supreme court rejected the argument, concluding that the evidence was probative of a motive to murder. This result is clearly correct. The evidence here did not simply invite the jury to conclude that because the defendant had been accused of other crimes in the past, he was a bad person and, as a bad person, must have committed the crime of which he was presently accused. Rather, the evidence suggested that the defendant committed the murder to escape prosecution, a motive that had nothing to do with the defendant’s character. See *supra* note 33.

B. Plan

In contrast to the seemingly expansive approach to admitting evidence of other acts to demonstrate motive, the Indiana Supreme Court emphasized a narrow interpretation of the Rule's admission of other acts evidence to show a plan, and in doing so distinguished Rule 404(b) from Indiana's prior common-law practice. In *Lay v. State*,³⁸ the defendant was charged with dealing in LSD within 1000 feet of a school. Over the defendant's objection, the trial court allowed testimony of uncharged drug sales during the two months before the charged offense. In an opinion announcing the result for the court, Justice Sullivan analyzed the evidence under the common-law rule allowing evidence of uncharged acts to show a "common scheme or plan" and concluded that the prior drug deals were sufficiently similar and related to the charged offense to fall within the common-law rule.³⁹ Although the conclusion that the evidence was admissible drew a majority of the court, Justice Sullivan's reasoning did not.

Justice Selby concurred in the result without opinion, and a majority of Justice DeBruler, concurring in the result, and Chief Justice Shepard, with whom Justice Dickson joined, dissenting, concluded that Rule 404(b)'s admission of evidence of other acts to show a plan was "a narrower exception than our old rule, which tended to degenerate into an all-purpose excuse for admitting pretty much any old prior misconduct."⁴⁰ Although the multiplicity of opinions prevented a united court from exploring further the parameters of Rule 404(b)'s admission of other acts evidence to show a plan, it is plain that the court will no longer consider arguments based on its pre-Rules jurisprudence in this area.⁴¹

C. Evidence of the Character of the Victim—Rule 404(a)(2)

Rule 404(a)(2) allows a criminal defendant to offer "evidence of a pertinent character trait of the victim of a crime;" once the defendant has raised the issue, the prosecution is may also introduce evidence of the victim's character to rebut the defendant's proof.⁴² In addition, in a homicide case the prosecution is permitted to introduce evidence of the victim's peaceful character to rebut evidence that the victim was the initial aggressor.⁴³ Although the Indiana Supreme Court did not have occasion to address this provision of Rule 404(a) during 1996, the court of appeals issued two significant opinions addressing the scope of a

38. 659 N.E.2d 1005 (Ind. 1995).

39. *Id.* at 1010.

40. *Id.* at 1015 (Shepard, C.J., dissenting). Chief Justice Shepard and Justice Dickson asserted that the evidence of the defendant's prior drug sales was inadmissible under Rule 404(b), and Justice DeBruler concluded that the testimony regarding the prior sales was "probative of a discrete and special criminal plan" and was therefore admissible. *Id.* at 1015 (DeBruler, J., concurring).

41. *See Spires v. State*, 670 N.E.2d 1313, 1315 & n.1 (Ind. Ct. App. 1996) (stating that analysis of admissibility of uncharged prior marijuana sales comes from the *Lay* dissent).

42. IND. R. EVID. 404(a)(2).

43. *See id.*

defendant's right to introduce evidence of the victim's character.

In *Johnson v. State*,⁴⁴ the court concluded that although a criminal defendant may introduce evidence of a pertinent character trait of the victim, the defendant may do so only through opinion or reputation testimony.⁴⁵ Evidence of specific acts by the victim is only admissible on cross-examination or where the victim's character is an essential element of a defense.⁴⁶

The *Johnson* court also emphasized that the right of a defendant to introduce evidence of a victim's character exceeds the prosecution's ability to introduce evidence of the defendant's character and that the defendant's injection of the victim's character into the case does not open the door to similar evidence of the defendant's character by the prosecution.⁴⁷ *Johnson* involved a murder which occurred during a fight. The State argued that once Johnson introduced evidence that his victim had a violent character, the State had an equivalent right to introduce evidence that the defendant had a prior record of fighting to show that the defendant had an aggressive character.⁴⁸ The court disagreed, holding that Rule 404(b) prohibits the use of uncharged acts to show bad character, and that the State may rebut evidence of the victim's aggressive character only with evidence that the victim was peaceful, not with evidence of the defendant's aggressive tendencies.⁴⁹

The court confronted a more difficult issue in *Williams v. State*.⁵⁰ There, the defendant, accused of attempted criminal deviate conduct and criminal confinement, claimed in his defense that the victim had consented to an exchange

44. 671 N.E.2d 1203 (Ind. Ct. App. 1996), *trans. denied*.

45. *Id.* at 1207.

46. *See id.*; IND. R. EVID. 405(b). It is difficult to imagine a situation in which a victim's character constituted an essential element of a defense. The courts have tended to apply the "essential element" requirement strictly. "The relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to opinion or reputation." *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir.), *cert. denied*, 116 S. Ct. 676 (1995). Thus, the federal courts and some state courts have held, for example, that a victim's violent character is not an essential element of the defense of self-defense. *See, e.g., id.*; *Perrin v. Anderson*, 784 F.2d 1040, 1045 (10th Cir. 1986); *State v. Alexander*, 765 P.2d 321, 324 (Wash. Ct. App. 1988). Other state courts, however, relying on their states' definitions of self-defense, have held that a victim's aggressive character is an essential element of the defense. *See, e.g., Gonzalez v. State*, 838 S.W.2d 848, 859 (Tex. App. 1992, no writ).

47. *Johnson*, 671 N.E.2d at 1207.

48. *Id.* at 1209.

49. The court's holding meant that the trial court's admission of evidence of Johnson's aggressive character was error. The court concluded, however, that the error was harmless in light of the substantial evidence establishing the defendant's culpability and disproving his claim of self-defense. *See id.* at 1208.

50. 669 N.E.2d 178 (Ind. Ct. App. 1996), *vacated and rev'd*, No. 44S02-9706-CR-355, 1997 WL 302398 (Ind. June 6, 1997). [Eds. Note: The discussion of the court of appeals decision is somewhat moot; it has, however, been retained for its insights into this area of the law.]

of sex for cocaine. To bolster his defense, the defendant offered the testimony of a friend of the victim, to the effect that the victim was addicted to cocaine and routinely performed sexual acts in exchange for cocaine or money.⁵¹ The trial court refused to allow the proffered testimony, asserting that it was irrelevant; the court of appeals disagreed and reversed the defendant's conviction.⁵²

Williams was a difficult case because it lay uncomfortably at the intersection of Rule 404(a)(2), Rule 412, and the defendant's constitutional right to introduce evidence that is material and favorable to his theory of defense.⁵³ Whereas Rule 404(a)(2) allows the defendant broad latitude to introduce evidence of the victim's character where pertinent, Rule 412 drastically limits the defendant's ability, in a sex offense case, to introduce evidence of the victim's sexual history. Rule 412 bars evidence of a victim's or witness' past sexual conduct except:

- (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
- (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
- (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
- (4) evidence of conviction for a crime to impeach under Rule 609.⁵⁴

Rule 412 cannot override the defendant's right to present a defense or confront his accusers. The extent to which this protection permits a defendant to introduce evidence of a victim's prior sexual conduct is uncertain. A number of courts, however, have concluded that the Constitution requires that a defendant be allowed to show that the victim engaged in a pattern of sexual behavior in circumstances highly similar to those underlying the criminal charge.⁵⁵

Williams addressed both the applicable rules and the constitutional issue. First, treating the evidence of the victim's addiction to cocaine as an issue separate from the evidence of her prior sexual conduct, the court determined that the evidence was "extremely probative of Williams's consent defense that the victim had agreed to have sex with the men in exchange for cocaine or money."⁵⁶ This portion of the opinion drew a sharp dissent from Judge Staton, who asserted that

51. *Id.* at 181.

52. *Id.* at 181-82.

53. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). *See also Montana v. Egelhoff*, 116 S. Ct. 2013, 2021-22 (1996) (characterizing *Chambers* as "a fact-intensive case").

54. IND. R. EVID. 412(a).

55. *See State v. Vaughn*, 448 So. 2d 1260, 1262 (La. 1983); *Davis v. State*, 546 N.W.2d 30, 33-34 (Minn. 1996); *State v. Hudlow*, 659 P.2d 514, 520 (Wash. 1983) (en banc). *See also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.16 (1995) ("A defendant may also have a constitutional right to prove a *pattern* of distinctive, consensual sexual behavior by the alleged victim that is highly similar to the facts of the incident being charged.").

56. *Williams*, 669 N.E.2d at 182. This observation shows that character evidence is often logically relevant. The real question is its legal relevance.

evidence of the victim's character under Rule 404(a) was admissible only in cases of battery and homicide and other cases in which self-defense and the victim's propensity for violence is at issue, as it had been under the common law.⁵⁷ Judge Staton conceded that Rule 404(a) contained no such explicit restriction, but argued that in the absence of such a restriction, the broad admission of evidence concerning the victim's character would lead to acquittals based not on evidence of the defendant's acts but on the fact that the victim was a bad person who "got what [s]he deserved."⁵⁸

Second, the court addressed the applicability of Rule 412 and the Constitution to the proffered evidence of the victim's sexual history. The court noted that Williams conceded the inadmissibility of the proffered evidence under Rule 412.⁵⁹ The court concluded, however, that under the circumstances of the case, Rule 412 must yield to the constitutional right of confrontation. The court adopted the West Virginia Supreme Court's analysis of the conflict between Rule 412 and the Confrontation Clause:

We would suggest that evidence of consensual sexual activities with others, not specifically and directly related to the act of which a victim complains, should never be admissible; and that such evidence, that is specifically, directly related to the act for which a defendant stands charged, must be of a quality that its admission is necessary to prevent manifest injustice and therefore outweigh the State's interest in protecting persons who have been sexually abused, from attempts at besmirchment of their character by ones who have trespassed upon their bodies.⁶⁰

Having stated the test, the court in cursory fashion concluded that the evidence of the victim's exchanges of sex for cocaine or money should be admitted on retrial.⁶¹

To the extent that the *Williams* decision is troubling, it is principally because of the cursory nature of its analysis. Certainly, the proffered testimony that the victim regularly engaged in acts of prostitution in exchange for cocaine or money to buy cocaine appears highly probative of the defendant's theory of the case. But the court did not carefully analyze the fit between the proffered testimony and the defendant's version of his encounter with the victim. Courts typically have required that "[t]o qualify as a pattern of clearly similar sexual behavior, the sexual conduct must occur regularly and be similar in all material respects."⁶² Even small

57. *Id.* at 183-84 (Staton, J., dissenting).

58. *Id.* at 184-85 (quoting 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 193 (John W. Strong ed., 4th ed. 1992)).

59. *Id.* at 182 n.3.

60. *Id.* (quoting *State v. Green*, 260 S.E.2d 257, 264 (W. Va. 1979)). The confrontation rights guaranteed by the Sixth Amendment and article I, section 13 of the Indiana Constitution are different. See *Owings v. State*, 622 N.E.2d 948, 950 (Ind. 1993); *Hurt v. State*, 578 N.E.2d 336, 337 (Ind. 1991). Therefore, practitioners would be well advised to raise arguments based on the Indiana Constitution in these cases.

61. *Williams*, 669 N.E.2d at 182 n.3.

62. *Davis v. State*, 546 N.W.2d 30, 34 (Minn. 1996) (citing cases).

differences between the alleged prior sexual conduct and the conduct for which the defendant seeks to offer a defense have been deemed sufficient to exclude the evidence of prior sexual conduct.⁶³ The Indiana Court of Appeals may have undertaken such an analysis before reaching its decision, but it did not detail the analysis in its opinion.

III. CHARACTER OF A WITNESS—RULE 609

In the sole case to address the use of a prior conviction to impeach a witness, the supreme court held that where Rule 609(a)(1) was concerned, the court would look only to the offense of conviction, rather than to the underlying conduct, to determine whether the offense fell within the enumerated categories. In *Cason v. State*,⁶⁴ the defendant, on trial for murder, attempted to challenge the credibility of one of the numerous witnesses who had identified him as the perpetrator by introducing evidence that the witness had been convicted for assisting a criminal. Assisting a criminal is not among the offenses enumerated in Rule 609(a)(1), an indisputable fact that the defendant readily conceded. The defendant contended, however, that the original charge against the defendant had been robbery, a conviction of which would properly be admissible under Rule 609(a)(1). The supreme court declined the invitation to look to the conduct underlying the offense of conviction, concluding that it could do no more than speculate as to whether it would have been possible to establish the elements of robbery beyond a reasonable doubt. The supreme court therefore concluded that it was not error to prevent the defendant from using the witness's prior conviction to impeach.⁶⁵ In doing so, the supreme court implicitly distinguished Rule 609(a)(1) from Rule 609(a)(2), which allows impeachment through evidence of prior offenses that involved dishonesty or deceit. Under that rule, the court has held, it is proper to look to the conduct underlying the offense of conviction to determine if the crime was one involving dishonesty or deceit.⁶⁶

IV. EXPERTS

A. *Qualification*

Rule 702(a) allows expert testimony by a witness "qualified as an expert by knowledge, skill, experience, training, or education."⁶⁷ The Indiana courts this year had little opportunity to explore the extent of the showing necessary to demonstrate sufficient knowledge, skill, experience, training, or education to qualify as an expert; rather, in most cases where there was a challenge to a proposed witness's expertise, the proper conclusion was readily apparent. For

63. *See id.*

64. 672 N.E.2d 74 (Ind. 1996).

65. *Id.* at 75.

66. *See In re Sheaffer*, 655 N.E.2d 1214, 1217 (Ind. 1995).

67. IND. R. EVID. 702(a).

example, in *Koziol v. Vojvoda*,⁶⁸ a case arising out of an automobile accident, the plaintiff sought to prevent the investigating police officer from offering an opinion as to the cause of the accident that would have laid fault on a non-party. The court concluded that the police officer was qualified to give an expert opinion, based on his eight years of experience in accident investigation, including investigation of over 3000 accidents, and his attendance at several training sessions and seminars in accident reconstruction.⁶⁹

B. Reliability

The extent to which a scientifically-based opinion must be shown to rest on a reliable methodology has been a controversial issue for as long as scientific experts have testified.⁷⁰ Federal Rule of Evidence 702 makes no explicit reference to reliability. In 1993, however, the U.S. Supreme Court held that Rule 702 allowance of expert testimony based on “scientific, technical, or other specialized knowledge” did incorporate a requirement of reliability.⁷¹

Unlike the Federal Rule, Indiana’s Rule 702 expressly requires that the proponent of scientific expert testimony satisfy the trial court “that the scientific principles upon which the expert testimony rests are reliable.”⁷² Indiana’s Rule, then, might be thought to incorporate a different standard of reliability, perhaps a more stringent one, than the Federal Rule. In *Steward v. State*,⁷³ however, the Indiana Supreme Court stated that “the federal evidence law of *Daubert* and its progeny is helpful to bench and bar in applying Indiana Rule of Evidence 702(b).”⁷⁴ Providing little additional guidance on the issue of scientific reliability, the *Steward* court left elaboration of the test to subsequent cases.

During the survey period, the supreme court has had little opportunity to refine the test of scientific reliability.⁷⁵ The court of appeals, however, has drawn

68. 662 N.E.2d 985 (Ind. Ct. App. 1996).

69. *Id.* at 990. The court also noted that the police officer had sufficient information available to allow him to render an opinion that would be helpful to the jury. In particular, the officer had interviewed those involved in the accident, was familiar with the area where the accident occurred, and was able to observe the scene of the accident shortly after it occurred. *Id.* at 990-91.

70. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Ct. App. 1923) (concluding that expert testimony based on scientific evidence is not admissible unless the method is “sufficiently established to have gained general acceptance in the particular field in which it belongs”).

71. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90 (1993).

72. IND. R. EVID. 702(b). Although the federal rule does not explicitly state that scientific reliability must be demonstrated before expert testimony will be permitted, the United States Supreme Court has interpreted the federal rule as requiring such a showing in cases where an expert’s scientific methods are challenged. *See Daubert*, 509 U.S. at 590-91.

73. 652 N.E.2d 490 (Ind. 1995).

74. *Id.* at 498. *Compare McGrew v. State*, No. 86S05-9705-CR-320, 1997 WL 370939, at *1 (Ind. July 8, 1997) (“[W]e find *Daubert* helpful, but not controlling.”).

75. The supreme court did decide one case involving a defendant accused of child molesting in which, as in *Steward*, the prosecution sought to introduce expert testimony of the “common behavior characteristics” of sexually abused children to show that the alleged child victims had

extensively on *Daubert* and its progeny to address the admissibility of expert medical testimony. In *Hottinger v. Trugreen Corp.*,⁷⁶ the plaintiff claimed that she suffered serious neurological damage following exposure to a pesticide manufactured by the defendant. Over the defendant's objection, the plaintiff introduced expert testimony from a doctor that tended to show causation. Relying on *Daubert*, the court of appeals set forth three factors to be considered in assessing the reliability of proffered scientific expert testimony: whether the theory or technique used can be empirically tested, whether the theory or technique has been subject to peer review and publication, and the extent to which the theory has gained acceptance.⁷⁷ Examining these factors, the court determined that the expert doctor had used sound diagnostic practices and that his conclusions regarding causation were bolstered by a number of publications that had been subject to peer review.⁷⁸ The testimony therefore met Rule 702(b)'s requirement of reliability.

C. Relevance—the Question of “Fit”

Reliability of methodology is not the only requirement for the admission of expert testimony. The *Daubert* decision also emphasized that proffered evidence must “fit” the case—it must be relevant to an issue that is genuinely in dispute.⁷⁹ Cases in which the fit of expert testimony is challenged may raise one of two problems. The first problem is definitional: has the proffering party sufficiently set forth an explanation as to why the expert's testimony will be helpful to the trier of fact? The second problem is more substantive: is the purpose set forth by the proffering party one that the both the substantive law and the law of evidence regard as legitimate? Cases involving both of these problems arose in the past year in Indiana courts.

In *Vega v. State*,⁸⁰ the court excluded expert testimony that might have been permitted had the proffering party better explained the purpose of the proffered testimony. In that case, the defendant, Anita Vega, was charged with involuntary manslaughter arising out of the death of her three-year-old daughter. Although the death had occurred in 1969 or 1970, the chief witness, the deceased girl's sister, did not come forward until 1992. At trial, the defendant offered the testimony of

indeed suffered sexual abuse. See *Fleener v. State*, 656 N.E.2d 1140, 1141 (Ind. 1995). The procedural posture of the case, however, meant that the court had little opportunity to expand on its previous work. In *Fleener*, the defendant had objected to the State's proffered expert testimony, and the trial court had allowed the State to proceed with its evidence without requiring the threshold showing of reliability called for by Rule 702(b). The supreme court concluded that this was error. See *id.* at 1141. Rather than reverse or remand for a new trial, however, the court held that the error was harmless. See *id.* at 1141-42.

76. 665 N.E.2d 593 (Ind. Ct. App. 1996), *trans. denied*.

77. *Id.* at 596. These factors should not be regarded as exclusive. The *Hottinger* court emphasized that “the inquiry envisioned by Rule 702 is . . . a flexible one.” *Id.* (quoting *Daubert*, 509 U.S. at 593).

78. *Id.* at 597.

79. *Daubert*, 509 U.S. at 591.

80. 656 N.E.2d 497 (Ind. Ct. App. 1995), *trans. denied*.

an expert psychologist, a specialist in human memory. During preliminary questioning, the trial judge asked the expert if he was able to predict whether a witness's memory was accurate. The doctor responded that he could not. Concluding that the doctor's testimony would not aid the jury in its consideration of any relevant factual issue, the trial court refused to allow the testimony.

On appeal, the defendant argued that the doctor's testimony would have aided the jury by challenging their assumptions about the accuracy of memories; in particular, she contended, the expert would have shown that memories of stressful or traumatic events tend, contrary to common belief, to be less accurate than memories of more pleasant occurrences. The court of appeals did not address the question of whether, given the defendant's new explanation of the expert testimony's import, the trial court should have permitted the jury to hear the testimony. It simply noted that the defendant had not offered that rationale to the trial court and concluded that the trial court had not abused its discretion in refusing to allow the testimony.⁸¹

Even if the defendant is able to explain in a comprehensible manner why expert testimony should be permitted, the court will not allow the testimony unless the purpose is a proper one under both the substantive law and the law of evidence. Two cases illustrate the pitfalls that lie in wait for unsuspecting counsel.

In *Buzzard v. State*,⁸² the defendant was tried on five counts of child molesting. Over the defendant's objection, the prosecution presented the testimony of an expert psychologist who had examined neither the defendant nor any of the child victims. The expert testified, rather, about the personality profile of a typical child molester, who, according to the expert's testimony, could be expected to molest anywhere between five and eight hundred children over the course of his lifetime. In closing argument, the prosecutor argued that the defendant met the profile described by the expert and urged the jury to convict in order to prevent the defendant from molesting again.

On appeal from the defendant's conviction, the court of appeals concluded that the expert's testimony had been admitted for an improper purpose: "Whether based on a personality profile or not, expert testimony is generally not an appropriate way to prove defendant's character for a particular trait."⁸³ The attempt to prove the defendant's guilt by offering evidence of his character, the court suggested, would have said nothing about whether the acts of which the defendant was accused actually occurred, and would have run the risk of usurping the jury's role as factfinder.⁸⁴ That the expert had not examined the defendant

81. *Id.* at 502-03. This case is really about a failure to give a proper offer of proof. *See* IND. R. EVID. 103(a)(2).

82. 669 N.E.2d 996 (Ind. Ct. App. 1996).

83. *Id.* at 999. Of course, the Indiana Rules of Evidence further restrict evidence of a defendant's character, of whatever kind, by prohibiting evidence of character to be used to show that the defendant acted in conformity therewith. *See* IND. R. EVID. 404(a); *see also* *Shaffer v. State*, 674 N.E.2d 1, 10 (Ind. Ct. App. 1996) (Robertson, J., dissenting), *trans. denied* (criticizing use of expert character evidence); *infra* notes 13-41 and accompanying text.

84. *Buzzard*, 669 N.E.2d at 1000 (citing *State v. Clements*, 770 P.2d 447, 454 (1989)).

simply reinforced the irrelevance of her testimony. The court of appeals therefore reversed and remanded for a new trial.

In *McClain v. State*,⁸⁵ the court faced a slightly different problem. There, the defendant, charged with aggravated battery, two counts of battery causing bodily injury, and two counts of resisting arrest, initially gave notice of an intent to present an insanity defense, as required by Indiana law,⁸⁶ but then withdrew the notice. The defendant nevertheless sought to present expert testimony suggesting that sleep deprivation had robbed him of the capacity to form the criminal intent necessary for guilt. On an interlocutory appeal, the court of appeals determined that the defendant's automatism defense was merely a form of insanity defense, which the defendant had withdrawn; therefore, even though the proffered testimony fit the issue as framed by the defendant, the evidence was inadmissible because the issue was one that, by statute, was not properly before the court.⁸⁷ The Indiana Supreme Court reversed, concluding that automatism did not fall within the statutory category of a "mental disease or defect" but rather was a transitory condition, similar to intoxication. Because that condition bore on the defendant's ability to form a criminal intent, the proffered testimony was relevant to an issue that was properly part of the case and thus was admissible.⁸⁸

D. Basis of Opinion Testimony

An expert may base her opinion on facts or data that would themselves be inadmissible, provided that the facts or data are of a type upon which experts in the particular field reasonably rely.⁸⁹ In *Faulkner v. Markkay of Indiana, Inc.*,⁹⁰ the Indiana Court of Appeals cautioned that Rule 703 must not be used as a means to place inadmissible evidence before the jury.

Faulkner was a slip-and-fall case in which the plaintiff presented an expert chiropractor to render an opinion about the nature and extent of her injuries. During his testimony, the chiropractor attempted to restate the conclusions of a number of examining physicians, on whose reports he purportedly had relied in forming his opinion. The court of appeals upheld the trial court's exclusion of the testimony: "We cannot allow an expert's reliance on hearsay to be employed as a conduit for placing the physicians' statements before the jury. The expert witness must rely on his own expertise in reaching his opinion and may not simply repeat opinions of others."⁹¹

The refusal to allow an expert to restate the opinions of others, rather than presenting her own opinion, is consistent with both Indiana's pre-Rules common

85. 670 N.E.2d 911 (Ind. Ct. App. 1996), *vacated and rev'd*, 678 N.E.2d 104 (Ind. 1997).

86. See IND. CODE § 35-36-2-1 (1993).

87. *McClain*, 670 N.E.2d at 915.

88. *McClain v. State*, 678 N.E.2d 104, 108-09 (Ind. 1997).

89. IND. R. EVID. 703.

90. 663 N.E.2d 798 (Ind. Ct. App. 1996), *trans. denied*.

91. *Id.* at 801 (footnote omitted).

law⁹² and practice under the Federal Rules,⁹³ and thus is relatively uncontroversial. Two aspects of the opinion, however, deserve further comment. First, the court went beyond a straightforward application of the general rule; it further suggested that a chiropractor could not possibly form an opinion based on medical reports written by physicians, because chiropractors lack the education, training, and expertise of medical doctors.⁹⁴ Indeed, the court went so far as to opine that chiropractors generally should not be permitted to testify as experts in cases involving physicians.⁹⁵ As Judge Sullivan noted in his concurring opinion, this conclusion seems overbroad—although chiropractors have more limited education, training, and expertise than medical doctors, there may be cases falling within the particular expertise of chiropractors in which chiropractors may properly be qualified to rely on physicians' reports in forming their opinions.⁹⁶ Although the court was undoubtedly correct that there will be occasions in which a purported expert's education, training, and expertise are so clearly deficient that the purported expert should not be permitted to render an opinion based on materials prepared by properly qualified individuals, that concern may in some cases simply go to the weight that the factfinder may reasonably give the evidence.

Second, *Faulkner* cited a number of Indiana cases for the proposition that a doctor may explain how otherwise inadmissible medical reports formed the basis of the doctor's opinion.⁹⁷ The court of appeals noted that these cases involved physicians testifying about the reports of other physicians⁹⁸—a proper distinction if one accepts the court's view of the differences between the education, training, and expertise of chiropractors and physicians. But the court also noted cryptically that the cases on which *Faulkner* relied were decided before Indiana adopted the Rules.⁹⁹ It is unclear what to make of this comment.¹⁰⁰ It should not, however, be read to foreclose all inquiry into the basis for an expert's opinion, particularly on cross-examination.¹⁰¹ At this point, the extent to which an expert should be permitted to testify about how inadmissible reports assisted her in forming an opinion should be regarded as an open question.

92. See *Miller v. State*, 575 N.E.2d 272, 274-75 (Ind. 1991).

93. See, e.g., *In re James Wilson Assoc.*, 965 F.2d 160, 172-73 (7th Cir. 1992).

94. *Faulkner*, 663 N.E.2d at 801.

95. *Id.* (citing *Stackhouse v. Scanlon*, 576 N.E.2d 635, 639 (Ind. Ct. App. 1991)).

96. *Id.* at 802 (Sullivan, J., concurring).

97. See *id.* at 801 n.5 (citing cases).

98. *Id.*

99. *Id.*

100. This is particularly so because the court's opinion itself is replete with citations to pre-Rules cases.

101. See IND. R. EVID. 612(c) (allowing party to introduce into evidence the materials which relate to expert's testimony on cross-examination).

V. HEARSAY

A. *Purpose for Offering Out-of-Court Statement*

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”¹⁰² The Rules create a three-tiered inquiry into whether an out-of-court statement is admissible. First, the court must ask whether the statement is being offered to prove the truth of the matter asserted. If it is not, then the statement is not hearsay and is admissible. Second, if the statement is being offered for the truth of the matter asserted, the court should ask whether the statement falls within the categories of statements that are defined as non-hearsay by Rule 801(d). Finally, if the statement is hearsay, the court must ask whether the statement is nevertheless admissible under Rule 803 or Rule 804.

In making the initial inquiry, the courts have proven quite willing to accept arguments that proffered out-of-court statements go to issues other than the truth of the matter asserted. In *Grund v. State*,¹⁰³ for example, the court allowed the defendant’s sister, Darlene, to recount a statement by the defendant’s daughter, Tanelle, about the defendant’s whereabouts at the time that the prosecution contended she was stealing the eventual murder weapon.¹⁰⁴ Whereas the defendant asserted that she had taken Tanelle to an ice-cream parlor, Tanelle stated, according to Darlene, that they had first gone for a ride in the country. Darlene further testified that the defendant had repeatedly corrected Tanelle. Tanelle’s statement clearly was logically relevant, because if the defendant had taken her daughter for a ride in the country she would have had an opportunity to steal the murder weapon, whereas if the defendant’s version of the facts were true, no such opportunity would have existed. Tanelle’s statement was not admissible for its truth, however, because it met none of the hearsay exceptions. The court nevertheless held that the statement was admissible. Rather than being admitted for its truth, the court concluded, Tanelle’s statement was admissible to show that the defendant attempted to coerce her daughter into changing her story, thus revealing her consciousness of guilt.¹⁰⁵ Whether the jury would be likely to take Tanelle’s statement as evidence that the defendant was trying to coerce her, rather than as evidence of the defendant’s whereabouts, depends on the instructions given to the jury, if any, about the statement, a subject that the court did not address.

*B. Rule 801(d)(1)(B): Prior Consistent Statements to Rebut
a Charge of Recent Fabrication*

Under Rule 801(d)(1)(B), a prior statement by a witness is not hearsay if it is consistent with the witness’s testimony and is presented to refute a charge of

102. IND. R. EVID. 801(c).

103. 671 N.E.2d 411 (Ind. 1996).

104. *Id.* at 415.

105. *Id.*

recent fabrication, improper influence, or improper motive.¹⁰⁶

One of the bases for allowing evidence of a prior consistent statement is that the declarant is a witness and can be cross-examined about the statement. If the declarant denies making the prior statement, or cannot remember making the prior statement, cross-examination is impossible and the prior statement is inadmissible. In *Brown v. State*,¹⁰⁷ the Indiana Supreme Court addressed the problem that arises when a witness recalls making a prior statement but does not recall the content of the prior statement (which is introduced through another witness).

Brown and his co-defendant, Ohm, were charged with multiple counts of robbery and murder. Brown's first trial, at which Ohm testified under a cooperation agreement, ended in a mistrial. Ohm then refused to testify at the second trial; because Ohm was unavailable, the trial court permitted his testimony from the first trial to be introduced.¹⁰⁸ At the first trial, Brown had challenged Ohm's credibility by suggesting that he had not admitted his involvement in the crime until the time at which he sought a plea agreement. To rehabilitate Ohm's credibility, the State offered the testimony of Mike Collins, who repeated statements that Ohm had made to him concerning Ohm's role.¹⁰⁹ Brown objected, citing Ohm's testimony that he did not recall what he had told Collins.¹¹⁰

On appeal, the supreme court acknowledged the general rule that where a witness denies making or cannot recall making the purported prior statement, the prior statement is inadmissible.¹¹¹ The court concluded, however, that where the witness acknowledges making the statement but testifies that he cannot recall exactly what he said, the witness is available for cross-examination, and the prior statement is admissible.¹¹²

C. Rule 801(d)(2)(E): Statements by a Co-Conspirator

A statement by a co-conspirator of a party, made during the course of and in

106. IND. R. EVID. 801(d)(1)(B).

107. 671 N.E.2d 401 (Ind. 1996).

108. *Id.* at 404.

109. *Id.* at 405. At the second trial, Collins' testimony, like Ohm's, was presented through the transcript of the first trial, because Collins was unavailable at the second trial. *Id.* at 405-06.

110. Ohm testified that he remembered telling Collins he was involved, but did not recall what he had said about his role in the crime. *Id.* at 406.

111. *See id.* (citing *Watkins v. State*, 446 N.E.2d 949, 960 (Ind. 1983)).

112. *Id.* at 407. In *Brown*, the state offered evidence of a second prior statement by Ohm, through the testimony of Angie Miller. Brown contended that Ohm's statement to Miller, denying any role in killing the two murder victims, was not consistent with his trial testimony, in which he stated that he and Brown had done the killings. The supreme court did not address the question of whether Ohm's prior statement was sufficiently inconsistent with his trial testimony to render the prior statement inadmissible. *Id.* at 408. In a case decided earlier in the year, the supreme court had held that a prior statement need not be entirely consistent with a witness's trial testimony to be admissible under Rule 801(d)(1)(B), provided that there was sufficient consistency in the essentials of the two statements to rebut a charge of recent fabrication. *See Willoughby v. State*, 660 N.E.2d 570, 579-80 (Ind. 1996).

furtherance of the conspiracy, is not hearsay and is admissible.¹¹³ The rule contains both a temporal requirement—the statement must be made during the pendency of the conspiracy—and a content-based requirement—the statement must be in furtherance of the conspiracy.

As to the first issue, the supreme court has emphasized that completion of the offense underlying a conspiracy charge does not necessarily mean that the conspirators have met their goals and that the conspiracy has come to an end, barring the admission of all subsequent co-conspirator statements under Rule 801(d)(2)(E). In *Willoughby v. State*,¹¹⁴ the defendant was charged with murder and conspiracy to commit murder in the shooting death of her husband. At trial, the state introduced, over the defendant's objection, a statement by the hit man allegedly hired by the defendant regarding the payment of proceeds from the deceased husband's life insurance. On appeal, the supreme court reasoned that because one of the aims of the conspiracy had been to obtain the insurance proceeds, the conspiracy had not terminated with the husband's death, and statements subsequent to the murder relating to the conspiracy's other goals were made during the conspiracy for the purposes of Rule 801(d)(2)(E).¹¹⁵

Whether a statement is made "in furtherance of" a conspiracy presents more difficult questions, which have not yet come before the supreme court. In *Leslie v. State*,¹¹⁶ the court of appeals addressed the issue. With no Indiana precedent upon which to rely, the court drew on a decision interpreting the analogous federal rule for an appropriate standard:

[T]he statements must in some way have been designed to promote or facilitate achievement of the goals of the ongoing conspiracy, as by, for example, providing reassurance to a coconspirator, seeking to induce a coconspirator's assistance, serving to foster trust and cohesiveness, or informing coconspirators as to the progress or status of the conspiracy, or by prompting the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates the carrying out of a criminal activity. Mere "idle chatter" does not satisfy the in-furtherance requirement.¹¹⁷

Idle chatter may, of course, be difficult to distinguish from statements among coconspirators regarding the status of the conspiracy. *Leslie* involved a charge of conspiracy to deal cocaine in an amount of over three grams. Leslie objected, on the grounds of hearsay, to several statements by his alleged co-conspirator, Hillsamer, as recounted by Hillsamer's roommate, Sperling.¹¹⁸ Leslie first

113. IND. R. EVID. 801(d)(2)(E).

114. 660 N.E.2d 570 (Ind. 1996).

115. *Id.* at 581. In reaching this decision, the court applied to the Rules the reasoning on which it had relied under the common law. See *Wallace v. State*, 426 N.E.2d 34, 42-43 (Ind. 1981).

116. 670 N.E.2d 898 (Ind. Ct. App. 1996), *trans. denied*.

117. *Id.* at 901 (citations omitted) (quoting *United States v. Tracy*, 12 F.3d 1186, 1196 (2d Cir. 1993)).

118. Hillsamer died well before the trial. Indeed, it appears that Hillsamer's death led to the authorities' discovery of Leslie's activities and to Leslie's subsequent arrest. See *id.* at 900-01.

objected to Hillsamer's statement, overheard by Sperling, to an apparent drug courier: "Tell Bobbie I don't have all of the money. I'll get it to him soon." This statement, the court concluded, easily fell within the co-conspirator rule, because it manifested a clear intent to further the conspiracy.

Second, Leslie contested the introductions of two statements to Sperling, "Bobbie's quality was always better," and "Bobbie delivers." The court reasoned that because Hillsamer made statements describing aspects of his collaboration with Leslie while that collaboration was ongoing, the statements were in furtherance of the conspiracy. The issue is, however, at least arguably more complicated than the court of appeals made it seem. Much would seem to depend on the roles in the conspiracy of Sperling, the individual to whom Hillsamer made the statements. If Sperling did play a role in the conspiracy—which is by no means clear from the court's opinion—then the statements easily could be interpreted as being in furtherance of the conspiracy. In that situation, the statements would amount to one co-conspirator explaining to another a decision or a course of action directly related to the conspiracy. But if Sperling, though aware of the existence of the conspiracy, did not himself participate, then the possibility arises that the statements represented no more than "idle chatter" between roommates.

Indeed, the court's ruling on Leslie's third objection recognized the importance of a statement's context to a Rule 801(d)(2)(E) ruling. The last of Hillsamer's statements to which Leslie objected responded to a question about whether Leslie ever dealt in quantities over one kilogram. Hillsamer answered, "Bobbie was close to being busted or raided . . . they just walked away from a, uh, large amount on a ship." This statement seems more like the recounting of a story than a discussion of a drug conspiracy's strategy or operations, and the court, in the absence of additional information about the context in which Hillsamer made the statement, was unwilling to conclude that the statement was more than idle chatter. Its admission therefore was error.¹¹⁹ Like the statements that the court deemed admissible, however, this statement does convey information about the nature and extent of the conspiracy's dealings. If, as the court states, context is vital to a determination of whether the final statement falls within the boundaries of Rule 801(d)(2)(E), it is difficult to see why additional context is not also needed before it can be determined that the statements "Bobbie delivers" and "Bobbie's quality was always better" can be deemed admissible.¹²⁰

D. Rule 803(4): Statements for Purposes of Medical Diagnosis or Treatment

Rule 803(4) provides that a patient's statements to a medical provider, made for the purpose of obtaining medical treatment or diagnosis, are admissible

119. *Id.* at 901. The court further concluded that, in light of the "ample" evidence against Leslie, the admission of this hearsay was harmless error. *Id.*

120. The court also did not discuss whether Rule 104(a) or Rule 104(b) governed the determination of whether there was a conspiracy and whether the statements were in furtherance of it. *See Bourjaily v. United States*, 483 U.S. 171, 175-81 (1987) (Rule 104(a) governs.).

“insofar as reasonably pertinent to diagnosis or treatment.” According to the Indiana Supreme Court’s decision in *McClain v. State*,¹²¹ application of Rule 803(4) requires a two-part inquiry: “1) is the declarant motivated to provide truthful information in order to promote diagnosis and treatment; and 2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.”¹²²

The *McClain* decision addressed the first part of this inquiry. In *McClain*, the defendant was convicted of child molestation. Among the evidence the prosecution presented was the testimony of a family therapist, who recounted the child victim’s description of what had happened.¹²³ The supreme court held that the introduction of this evidence was error, concluding that for a statement to be admissible under 803(4), the declarant must subjectively believe that the statement is being made for the purpose of obtaining a diagnosis and/or treatment. Although such subjective belief may often be inferred from the circumstances in which the statement is made, in cases where the declarant is a young child “there must be evidence that the declarant understood the professional’s role in order to trigger the motivation to provide truthful information.”¹²⁴ The court found no such evidence in the record, and therefore concluded that the statement did not fall within Rule 803(4).¹²⁵

The Indiana Supreme Court has not yet spoken on the second factor under Rule 803(4), the inquiry into whether the statement consisted of information on which an expert in the field would rely in making a diagnosis or rendering treatment. That issue has arisen before the Indiana Court of Appeals, however, and in deciding the issue the court has, perhaps unthinkingly, read Rule 803(4) far more broadly than the federal courts have interpreted the parallel federal rule.

In *Thomas v. State*,¹²⁶ the defendant was charged with aggravated battery and assault after he beat his wife and bit her on the face and arms.¹²⁷ At trial, the doctor who had treated the victim testified on behalf of the state. The doctor recounted, over the defendant’s objections, the victim’s description of how she had received her wounds, including the identity of her attacker.¹²⁸ The court of appeals concluded that this testimony was properly admitted under Rule 803(4), because the statements “were made for the purpose of diagnosing and treating her injuries.”¹²⁹ In so concluding, the court credited the doctor’s testimony that “the treatment of the patient really depends upon what you’re told by the patient” and

121. 675 N.E.2d 329 (Ind. 1996).

122. *Id.* at 331.

123. *Id.* at 330.

124. *Id.* at 331.

125. Having found error, the court nevertheless affirmed the defendant’s conviction on the grounds that the error was harmless.

126. 656 N.E.2d 819 (Ind. Ct. App. 1995).

127. The victim’s bite wounds were so severe that one eye had to be surgically removed. *See id.* at 821.

128. *Id.* at 823. *But see McClain*, 675 N.E.2d at 331.

129. *Thomas*, 656 N.E.2d at 823.

that, in this victim's case, it was particularly important for treatment to know that the bite wounds had been inflicted by a human.¹³⁰

The *Thomas* decision may appear to be a straightforward application of Rule 803(4), but in fact it represents a significant expansion from the traditional application of the parallel federal rule. Under Federal Rule 803(4), the courts typically distinguish between statements relating to cause, which are deemed relevant to diagnosis and treatment and are therefore admissible, and statements relating to fault, which, though they may be of interest to the declarant, typically are irrelevant to the doctor's work and are therefore inadmissible hearsay.¹³¹ A statement identifying the individual who inflicted the victim's injuries falls within the latter category of statements and is therefore barred by the hearsay rule.¹³² The *Thomas* court, by permitting the doctor to testify about the victim's identification of her attacker, ignored the federal rule's distinction between cause and fault and admitted evidence that would have been inadmissible in federal court.¹³³

The federal courts have recognized a narrow exception to the general distinction between cause and fault: where a victim of sexual abuse (particularly a child victim) identifies the perpetrator as a member of the victim's family, the perpetrator's identity is generally held relevant to diagnosis and treatment on the grounds that the victim will have suffered a distinct psychological injury from having been so treated by a family member.¹³⁴ A similar rationale might justify admitting the identification of violent family members in instances of non-sexual assault, although the federal courts, to date, have not extended the exception in that way. But the doctor in *Thomas* did not testify about, and the *Thomas* court did not base its decision on, any psychological harm to the victim or any treatment of such harm. At its broadest, *Thomas* could be read to hold that virtually anything a patient tells a doctor while seeking medical treatment is relevant to that treatment and therefore admissible under Rule 803(4). Whether the Indiana courts continue to adhere to the expansive interpretation of Rule 803(4) suggested in *Thomas* remains to be seen.

CONCLUSION

Indiana's transition to the Rules of Evidence, although formally complete when the Rules took effect on January 1, 1994, is an ongoing process, as the courts

130. *Id.*

131. See, e.g., *United States v. Pollard*, 790 F.2d 1309, 1313 (7th Cir. 1986), *overruled on other grounds by* *United States v. Sblendorio*, 830 F.2d 1382, 1393 (7th Cir. 1987); *United States v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979).

132. *Pollard*, 790 F.2d at 1314; *Nick*, 604 F.2d at 1202.

133. The fact that the bite wound was inflicted by a human would be relevant to cause, and therefore would be admissible pursuant to Federal Rule 803(4). The identity of the biter, however, would not.

134. See, e.g., *United States v. Tome*, 61 F.3d 1446, 1450 (10th Cir. 1995); *United States v. Yazzie*, 59 F.3d 807, 812 (9th Cir. 1994); *United States v. Longie*, 984 F.2d 955, 959 (8th Cir. 1993). See also L. Timothy Perrin, *Expert Witnesses Under Rules 703 and 803(4) of the Federal Rules of Evidence: Separating the Wheat from the Chaff*, 72 IND. L.J. 939, 962-63 (1997).

continue the work of applying the dry text of the Rules to real-world situations. In doing so, the courts have hit the occasional bump in the road, and a few of the courts' decisions have been idiosyncratic. It is therefore difficult to predict how the courts will respond when confronted with new situations under the Rules. In light of this uncertainty, practitioners would do well to draw the court's attention not merely to the text of the Rules themselves but also to the policies underlying the Rules, as they have been enunciated by the federal courts and by the courts of other states.

SURVEY OF INDIANA FAMILY LAW IN 1996

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INTRODUCTION

This Article reviews family law cases decided by Indiana appellate courts in 1996. The cases discussed include topics such as property valuation and distribution in a divorce, child custody, child support and paternity. The authors have selected cases which will either clarify, modify or change issues that relate to family law. Legislative modifications to family law statutes will also be noted.

I. ANTENUPTIAL AGREEMENTS

In *Rider v. Rider*,¹ the Indiana Supreme Court dealt with an antenuptial agreement that was conscionable when made, but alleged to be unconscionable at the time of dissolution. In *Rider*, the wife argued that the provision which barred the payment of spousal maintenance had become unconscionable because her health had deteriorated during the marriage. The trial court found that “the Antenuptial [sic] agreement is not binding. The Court finds the [wife] to be physically incapacitated to the extent that the ability of the [wife] to support herself is materially affected and the Court finds that maintenance is necessary during her period of incapacities”²

The court of appeals relied on *Justus v. Justus*³ and *Gross v. Gross*⁴ for its conclusion that it was not an unconstitutional impairment of contract to refuse to enforce a nonmaintenance provision of an antenuptial agreement because the state’s interest in not having a spouse become a public charge outweighed the parties’ freedom to contract.⁵

On transfer, the supreme court noted that Indiana’s version of the Uniform Premarital Agreement Act (UPAA)⁶ addresses the issue of unconscionability of

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1. 669 N.E.2d 160 (Ind. 1996).

2. *Id.* at 161.

3. 581 N.E.2d 1265 (Ind. Ct. App. 1991). The *Justus* court held, “If an antenuptial agreement dividing property between the parties would leave a post-dissolution reality in which one spouse would not have sufficient property to provide for his reasonable needs, then the court may refuse to enforce the antenuptial agreement.” *Id.* at 1274.

4. 464 N.E.2d 500 (Ohio 1984).

5. See *Rider v. Rider*, 648 N.E.2d 661, 664-65 (Ind. Ct. App. 1995), *adopted in part, vacated in part*, 669 N.E.2d 160 (Ind. 1996).

6. IND. CODE §§ 31-7-2.5-1 to -10 (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE §§ 31-11-3-1 to -10).

nonmaintenance provisions at the time of dissolution;⁷ however, because the UPAA did not take effect until July 1, 1995, it was not applicable to the antenuptial agreement in *Rider*.⁸

Although the supreme court adopted the appellate court's reasoning, it held that the trial court erred by not enforcing the agreement because it and the court of appeals failed to consider the relative financial positions of the spouses.⁹ The evidence presented at trial indicated that wife had assets of \$65,000 and was receiving \$645 per month from a prior spouse for child support. However, husband had personal assets worth only several thousand dollars and had a pension which paid \$1247 per month. The supreme court stated,

[B]oth the trial court and the Court of Appeals failed to consider the relative financial positions of the spouses. Unconscionability involves a gross disparity. Thus, while an antenuptial agreement which would force one spouse onto public assistance may be unconscionable, we believe that a finding of unconscionability requires a comparison of the situations of the two parties.¹⁰

The supreme court characterized this case as one where "one party is left with a modest income stream, while the other party is left with a modest amount of real and personal property."¹¹ Accordingly, it was not unconscionable to enforce the parties' antenuptial agreement.

II. DETERMINATION OF MARITAL PROPERTY AND DISTRIBUTION

During 1996, several interesting themes arose concerning property distributions in divorces.¹² One theme involved the trial court's discretion to determine the date to value an asset and the discretion to assign the risk of loss from changes in value.¹³ Another theme was that the parties could not claim trial

7. *See id.* § 31-7-2.5-8(b) (repealed 1997) (to be recodified at IND. CODE § 31-11-3-8(b)).

8. *Rider*, 669 N.E.2d at 164.

9. *See id.*

10. *Id.* (citing *Justus v. Justus*, 581 N.E.2d 1265, 1272 (Ind. Ct. App. 1991)).

11. *Id.* at 165. *See also* *Pardieck v. Pardieck*, 676 N.E.2d 359, 364 (Ind. Ct. App. 1997) (following *Rider*).

12. Generally, those questions involved identification of property, determination of its value and the equitable basis for its distribution. "Is it property?" concerns whether there is a possessory interest or a vested right to tangible or intangible property which can reasonably be valued. "Is it marital property?" concerns whether property should be excluded from the marital estate because of an enforceable antenuptial agreement or because the property right accrues in the future. "What's it worth?" is the valuation issue. "How should the property be distributed?" looks to whether an equal or unequal distribution is justified by the circumstances of a particular case. *See* Michael G. Ruppert, *Survey of Recent Developments in Family Law*, 23 IND. L. REV. 363 (1990). An inappropriate resolution of any of the first three issues can have a devastating impact on the resolution of the fourth issue, resulting in an unfair property distribution.

13. *See* *Quillen v. Quillen*, 671 N.E.2d 98 (Ind. 1996), *vacating in part, adopting in part*

court error based on the parties' failure to present evidence of the existence or value of an asset.¹⁴ Two cases were responsible for defining dissipation of assets, and distinguishing "dissipation" from "disposition" of assets.¹⁵ One case addressed an issue of first impression: whether the likelihood that one spouse will inherit from a not-yet-deceased parent may be considered in determining an equitable distribution of property.¹⁶

A. Non-Marital-Property List Grows

In *Jendreas v. Jendreas*,¹⁷ the Indiana Court of Appeals held that husband's union disability pension was not marital property subject to distribution by the divorce court.¹⁸ The wife in *Jendreas* relied on *Gnerlich v. Gnerlich*¹⁹ to support her contention that it was error to exclude the value of the disability pension from the marital pot.²⁰ The *Jendreas* court pointed out that in *Gnerlich*, the court of appeals determined that proceeds of an employer-sponsored disability insurance plan were property subject to distribution.²¹ However, the *Jendreas* court noted that the Indiana Supreme Court specifically limited²² *Gnerlich* in *Leisure v. Leisure*.²³ In *Leisure*, the supreme court observed that the husband's worker's compensation benefits did not require any contribution by him and were specifically designed to replace future income that would be lost due to injury. It therefore held that the worker's compensation benefits were non-marital property.²⁴ The spouse in *Gnerlich*, however, became entitled to the benefits due to monthly contributions to the employer-sponsored program, which required the use of a marital asset, income, thereby depriving the marital estate of the use of those funds.²⁵ Thus, the supreme court analogized the disability insurance proceeds to the deferred compensation of a pension which are accumulated as a marital asset.²⁶ Both the trial court and the appellate court specifically found that Mr. Jendreas' benefits represented compensation for future loss of income because

659 N.E.2d 566 (Ind. Ct. App. 1995); *Reese v. Reese*, 671 N.E.2d 187 (Ind. Ct. App. 1996), *trans. denied*.

14. See *Quillen*, 671 N.E.2d 98; *Conner v. Conner*, 666 N.E.2d 921 (Ind. Ct. App. 1996).

15. *In re Marriage of Coyle*, 671 N.E.2d 938 (Ind. Ct. App. 1996); *Roberts v. Roberts*, 670 N.E.2d 72 (Ind. Ct. App. 1996), *trans. denied*.

16. *Hacker v. Hacker*, 659 N.E.2d 1104 (Ind. Ct. App. 1995). This case was decided just two days prior to the survey period, and therefore was not included in the previous survey.

17. 664 N.E.2d 367 (Ind. Ct. App. 1996), *trans. denied*.

18. See *id.* at 371.

19. 538 N.E.2d 285 (Ind. Ct. App. 1989).

20. *Jendreas*, 664 N.E.2d at 370.

21. *Id.* at 370-71.

22. *Id.* at 371.

23. 605 N.E.2d 755 (Ind. 1993).

24. See *Jendreas*, 664 N.E.2d at 371 (citing *Leisure*, 605 N.E.2d at 758-59).

25. See *id.* (citing *Gnerlich v. Gnerlich*, 538 N.E.2d 285, 288 (Ind. Ct. App. 1989)).

26. See *id.*

the record contained no evidence regarding whether Mr. Jendreas had ever made any contributions to the acquisition of the disability pension during his employment; i.e., there was no evidence of a depletion of marital assets as in *Gnerlich*.²⁷ In all three cases, eligibility for the benefit depended upon disability and the benefits were designed to compensate for loss of future income. In *Leisure* and *Jendreas*, the wife contributed nothing to her husband's right to receive worker's compensation benefits and, consequently, they were not in the pot. In *Gnerlich*, the spouse paid insurance premiums from income, causing the benefits to be in the pot.

There can be no doubt that many spouses accumulate pension benefits, as opposed to disability benefits, without any actual monetary contributions to those pension benefits. Yet those pensions are still subject to valuation and distribution by the court. Resting the outcome in disability benefit cases on whether the trial court finds the benefit to be deferred compensation or replacement of future wages, as the *Jendreas* court does in part, must ultimately fail. These cases seem to show that the distinction between being in or out of the pot depends upon whether an actual contribution from a marital asset can be shown for acquiring the disability benefit.

In *Reese v. Reese*,²⁸ the court determined that all of the proceeds from the sale of a business which were attributable to a covenant not to compete were not replacement of future income as husband contended but were to "protect" the goodwill of the business which is a marital asset and includable in the pot.²⁹ From the decision, in which the court of appeals characterized the husband's argument as an invitation to reweigh the evidence,³⁰ it is unclear what sort of evidence the husband introduced at trial concerning his contention that the proceeds from the covenant were to replace future lost income, other than that he received \$7.85 million for his stock and \$3.6 million for the covenant. It would seem that the purpose of a covenant not to compete almost always, in part, is intended to protect the future goodwill of a business from diminishing by the competing efforts of the former owner after the sale. However, such covenants also prevent the former owner from making a living pursuing the same sort of business. If the only evidence necessary to create a conflict with plausible evidence of future lost income is the reality that such covenants protect goodwill, it would seem virtually impossible to ever overcome on appeal the finding of a trial court that proceeds from such a covenant are marital property as opposed to future income.³¹

27. *See id.*

28. 671 N.E.2d 187 (Ind. Ct. App. 1996), *trans. denied*.

29. *See id.* at 192 (citing *Berger v. Berger*, 648 N.E.2d 378, 383 (Ind. Ct. App. 1995)).

30. *See id.*

31. *But cf. Berger*, 648 N.E.2d at 383 (stating that even though the asset purchase agreement contained a provision for goodwill, "Indiana law has long held a restrictive covenant ancillary to the sale of a business represents the sale of the goodwill of that business . . ."). However, the *Berger* court recognized that part of the proceeds for the restrictive covenant were intended to be compensation for the husband's agreement not to compete and that part of the proceeds may be for future income. Thus, the *Berger* court remanded and ordered the trial court to determine the

In *Roberts v. Roberts*,³² the court addressed whether a law degree earned by one spouse during a marriage is marital property subject to division in a dissolution. In *Roberts*, husband quit his \$30,000 per year job to attend law school while his wife continued to work full time and run the household. When husband was about to graduate, he filed for divorce. Although husband's law degree was not listed by the trial court as a marital asset, his student loans were listed as a marital debt. Wife appealed and argued that the law degree should be a marital asset and the student loans incurred by husband should not be included as marital debt.

The court of appeals, citing *Prenatt v. Stevens*,³³ held that a law degree was not marital property.³⁴ The court did note, however, that pursuant to sections 31-1-11.5-11(c)(3) and (5) of the Indiana Code,³⁵ "the enhanced earning ability of a

amount of the restrictive covenant that was intended to compensate the husband for the goodwill of the practice and to include that portion in the marital estate for distribution. *Id.* at 384. See Michael G. Ruppert & Paula J. Schaefer, 1995 *Survey of Indiana Family Law*, 29 IND. L. REV. 913, 916 (1996). The *Reese* court, however, did not disturb the trial court's discretion.

32. 670 N.E.2d 72 (Ind. Ct. App. 1996), *trans. denied*.

33. 598 N.E.2d 616 (Ind. Ct. App. 1992).

34. The court wrote:

A degree is an intangible which is personal to the holder. It is a piece of paper and has no real value except for what the holder chooses to pursue with it. Potential worth is dependant upon choice and availability of work, whether the holder is good at what she does, or a myriad of other potentialities.

Valuation of a degree is fraught with uncertainty because of the personal factors described above. Even if valuation could be made certain, such valuation, whether based on future earning capacity or upon cost of acquisition, would ultimately result in an award beyond the actual physical assets of the marriage.

Roberts, 670 N.E.2d at 75-76 (citing *Prenatt*, 598 N.E.2d at 620).

35.

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

....

(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.

....

(5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

degree-earning spouse may certainly be considered in making a division of the marital assets.”³⁶ The court further held that the student loans in husband’s name were incurred during the marriage, thus, it was appropriate that they were listed as part of the marital estate.³⁷ The court opined that because the trial court assigned all of the student loan debt to the husband, the wife “suffered no harm whatever from their inclusion.”³⁸

B. Valuation of Marital Property

*Quillen v. Quillen*³⁹ and *Reese v. Reese*⁴⁰ stand for the proposition that the trial court’s discretion to determine the most appropriate valuation date for a marital asset necessarily empowers the trial court with the same discretion to assign the risk of loss to one spouse or the other for changes in the value of that asset.

In *Quillen*, the Indiana Supreme Court reversed the portion of the court of appeals decision⁴¹ that found the trial court abused its discretion by accepting a business valuation as of a date when husband was still running the business, as opposed to a date after the discontinuation of his business subsequent to his arrest on numerous counts of child molestation. In the court of appeals decision, Judge Kirsch, writing in the face of a strong dissent by Judge Hoffman, stated:

We recognize that the trial court has wide discretion in selecting a valuation date. Proper exercise of that discretion, however, requires that the valuation date have some relation to the true value of the asset. . . . This court has never upheld an asset valuation that completely ignores factors which, as admitted by the [wife’s] supporting valuation expert, would have a negative effect on the asset’s value. [The] trial court’s choice of valuation date must further a just and reasonable property distribution *under the circumstances*.⁴²

Judge Kirsch then stated,

We hold that where, as here, the value of a marital asset changes radically between the date of final separation and the final hearing, it is an abuse of the trial court’s discretion to select a valuation date that does not account for the events contributing to that change. We remand this matter to the trial court with instructions to revalue Quillen Construction in

IND. CODE § 31-1-11.5-11(c) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-5).

36. *Roberts*, 670 N.E.2d at 76.

37. *See id.* at 77.

38. *Id.*

39. 671 N.E.2d 98 (Ind. 1996).

40. 671 N.E.2d 187 (Ind. Ct. App. 1996) (citing *Taylor v. Taylor*, 436 N.E.2d 56, 58-59 (Ind. 1982)).

41. *Quillen v. Quillen*, 659 N.E.2d 566 (Ind. Ct. App. 1995), *adopted in part, vacated in part*, 671 N.E.2d 98 (Ind. 1996).

42. *Id.* at 572-73 (emphasis added).

accordance with this opinion. The trial court is also directed to adjust the property division to achieve an equal distribution which accounts for the revised value of the business.⁴³

The supreme court, however, sided with Judge Hoffman's dissent and stated that the majority had merely reweighed the evidence and reinstated the trial court's valuation date.⁴⁴

Judge Kirsch's analysis certainly appeals to common sense—wife's own expert admitted that the value would be different taking into consideration the husband's criminal charges and the inability of the husband to secure future financing due to those changes. However, because the husband decided not to continue to operate the company, even though he did similar work for his son's construction company after discontinuing his business, the bank loan officer testified that disapproval of any future loan request, although likely, was not certain. Thus, because of the conflicting evidence, the trial court is given broad discretion to determine the valuation date, and necessarily determines who will bear the risk of loss for changes in value.⁴⁵ The supreme court noted: "The selection of the valuation date for any particular marital asset has the effect of allocating the risk of change in the value of that asset between the date of valuation and the date of the hearing. We entrust this allocation to the discretion of the court."⁴⁶

A few months after the supreme court's decision in *Quillen*, a different panel of the court of appeals, in *Reese v. Reese*,⁴⁷ was confronted with a similar substantial change in value of a corporation between the date of filing and the date of dissolution.

When one compares the obvious reduction in value in *Reese* with the conflicting evidence regarding the reduction in value in *Quillen*, the modified rule in *Quillen* begins to seem like a fairly sound limitation on a trial court's discretion in valuation cases. In *Reese*, the parties owned the majority of stock in several corporations. One of those corporations, Cadence Environmental Energy, Inc., was engaged in hazardous waste disposal. Both husband's and wife's valuation experts valued the business as of June 1992. Both valuations relied upon a business forecast prepared by the corporation's employees which took into account new environmental regulations that would take effect in August 1992, and the anticipated impact upon the corporation's business. Husband's experts, using one accounting approach, valued the corporation at \$7.8 million. Wife's experts, using a different valuation method, valued the business at \$14 million.⁴⁸

The trial occurred approximately one year after the first valuations. At the time of trial, husband presented evidence that the impact of the new regulations

43. *Id.* at 573.

44. *See Quillen*, 671 N.E.2d at 102.

45. *See id.* at 103.

46. *Id.*

47. 671 N.E.2d 187 (Ind. Ct. App. 1996).

48. *See id.* at 189-90.

was greater than anticipated. His experts prepared a new valuation showing that the regulations had caused the corporation's value to drop drastically, approximately \$2 million in one year.⁴⁹

Although the trial court in *Reese* acknowledged the new regulations and their impact on the corporation's value, it found that the husband should bear the risk of the change in value because he had complete control of the company before and after the petition for dissolution of marriage was filed.⁵⁰ However, apparently the control issue did not involve any misfeasance in the operation of the corporation and, in fact, would have allowed husband to sell the business *pendente lite*.⁵¹ In other words, the factual uncertainty giving rise to the trial court's exercise of discretion was its finding that husband's control of the corporation allowed him to attempt to sell it. The court explained,

Although the date selected for the valuation has the effect of allocating the risk of a change in value between the parties, this allocation of risk is entrusted to the discretion of the trial court. The choice of an early valuation date for an asset which decreases in value is not necessarily an abuse of discretion. We will reverse the trial court's decision as to a valuation date only if it is clearly against the logic and effect of the facts and circumstances before the trial court.⁵²

After *Quillen* and *Reese*, it becomes difficult to imagine what could possibly be an abuse of discretion when the trial court selects a higher, earlier asset valuation even though there was no dispute that a substantial decrease occurred in the value of a significant marital asset.

If *Quillen* and *Reese* show the need for a more sensible valuation rule, they also demonstrate that appellate courts cannot disturb a divorce court's findings, unless there is an abuse of discretion. Admittedly, the trial court's discretion can protect an innocent spouse from devious manipulations of value by the spouse in control of the asset. But these cases do not show any deviousness on the parts of Mr. Quillen or Mr. Reese.⁵³ Perhaps the only solution to the dilemma faced in *Quillen* is legislation that will give a trial court more guidance concerning the valuation of an asset. For example, the trial court could still consider the

49. *See id.*

50. *Id.* at 191-92.

51. *See id.* at 193. Footnote 6 indicates that there was no evidence of any offers to purchase the corporation: "[Husband] argues that this finding is erroneous because there is no evidence of any offers to purchase Cadence. [Husband] did not have to wait for a purchase offer. If a sale of Cadence was the best option, he could have put the business up for sale and solicited offers."

52. *Id.* at 191 (citing *Quillen v. Quillen*, 671 N.E.2d 98, 102-03 (Ind. 1996)).

53. Mr. Quillen did argue to the court of appeals that "the trial court impermissibly relied upon fault when dividing the marital property and allocating the expenses. He claims that the court sought to punish him for the criminal allegations against him." *Quillen v. Quillen*, 659 N.E.2d 566, 578 (Ind. Ct. App. 1995), *adopted in part, vacated in part*, 671 N.E.2d 98 (Ind. 1996). However, because the trial court divided the marital estate equally, the court of appeals found that the trial court had not injected fault into the property distribution. *Id.* at 579.

dissipation or unusual disposition of an asset in the distribution process because of section 31-1-11.5-11(c)(4) of the Indiana Code.⁵⁴ In short, a spouse's dissipation or ambiguous actions in disposing of property would be accounted for openly in deciding whether an even distribution was fair, rather than through the sleight of hand of giving that spouse a fifty percent share consisting of overvalued assets.

*C. Dissipation and Disposition—Last Vestiges of Fault
in Property Distribution*

*In re Marriage of Coyle*⁵⁵ is significant because it establishes guidelines for determining and distinguishing dissipation and disposition of assets as they relate to distribution of marital property.⁵⁶ In *Coyle*, wife appealed the trial court's property distribution which awarded her thirty-seven percent of the total marital estate, arguing that the trial court abused its discretion when it found that she had dissipated marital assets in transactions involving her children by a prior marriage.⁵⁷ The trial court also found that husband brought approximately sixty-four percent of the assets into the marriage.⁵⁸ The dissipation recited by the trial court included: lost interest income due to an interest-free loan to her daughter, payment of her daughter's college expenses for which she sought no reimbursement from the child's father, and expenditure of funds to assist her daughter with the purchase of used automobiles.⁵⁹

The court observed that neither dissipation nor disposition are defined by the Dissolution of Marriage Act.⁶⁰ In *Coyle*, wife astutely observed that

54.

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

....

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

IND. CODE § 31-1-11.5-11(c)(4) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-5(4)).

55. 671 N.E.2d 938 (Ind. Ct. App. 1996).

56. Dissipation and disposition of assets is the fourth factor listed in the statute as a basis for deviating from a 50-50 distribution. See IND. CODE § 31-1-11.5-11(c) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-5). See *supra* note 54.

57. *Coyle*, 671 N.E.2d at 941-42.

58. *Id.* at 945.

59. *Id.* at 944.

60. IND. CODE § 31-1-11.5-1 to -28 (1993 & Supp. 1996) (repealed 1997) (to be recodified at scattered sections of title 31 of the Indiana Code); *Coyle*, 671 N.E.2d at 942, 944.

without a clear legislative or judicial definition of the term [dissipation], parties to a dissolution are allowed to revisit and dispute “virtually any financial transaction or personal decision affecting finances” made during the marriage in a search for conduct that may be characterized as dissipation.⁶¹

Acknowledging the burden such a situation places on the trial court, Judge Najam wrote,

Fault is not relevant in dissolution proceedings except as related to the disposition or dissipation of marital assets. One spouse’s claim of improvident spending by the other spouse can be a powerful weapon in an attempt to secure a larger share of the marital estate. However, a trial court presiding over a dissolution proceeding in which dissipation is an issue should not be required to perform an audit of expenditures made during the marriage in order to determine which spouse was the more prudent investor and spender. The institution of marriage would be ill-served if spouses were encouraged to maintain a continuous record of expenditures and transactions during the marriage for use in the event they were ever divorced.⁶²

Starting with the rule of statutory construction that undefined words and phrases in a statute are to be given their plain, ordinary and usual meaning, Judge Najam noted that “[w]aste and misuse are the hallmarks of dissipation. Our legislature intended that the term carry its common meaning denoting ‘foolish’ or ‘aimless’ spending.”⁶³ Judge Najam then set out a variety of considerations that the trial court must weigh when confronted with allegations of dissipation.⁶⁴ Noting that spouses to second or subsequent marriage frequently provide some form of

61. *Coyle*, 671 N.E.2d at 942.

62. *Id.* (citations omitted).

63. *Id.* at 943 (citing *Roberts v. Roberts*, 670 N.E.2d 72, 76 (Ind. Ct. App. 1996)).

64.

The proper inquiry requires the trial court to weigh various considerations. While intent is not an essential element of dissipation, intent to hide, divert or otherwise deplete the marital estate is relevant. . . . The fact that one spouse or the marriage itself does not benefit directly from an expenditure does not, standing alone, require a finding that a dissipation of marital assets has occurred. . . . The non-dissipating party’s participation in or consent to the expenditure is a relevant consideration. However, disagreements over the use of money can occur in any marriage. Even a sharp disagreement between spouses over the wisdom of an expenditure, without more, does not render that expenditure a dissipation of marital assets. . . . Before a spouse is chargeable with a dissipation of assets, the party claiming dissipation must show something more substantial than that the transaction was disputed at the time or that the transaction appears in retrospect to have been unwise. The test is whether the asset was actually wasted or misused.

Id. at 943-44 (citations omitted).

financial support to each other's children, including that for education, automobiles and houses, the court remanded to the trial court with instructions to reconsider whether wife's actions amounted to dissipation.⁶⁵ In doing so, the court also instructed the trial court to consider whether the wife's actions, if not dissipation, amounted to a "disposition" of marital property which also would permit a deviation from a 50/50 distribution.⁶⁶

Roberts v. Roberts,⁶⁷ in addition to addressing whether a law degree was a marital asset, also addressed the intriguing question of whether the pursuit of a law degree was the dissipation of marital assets in light of the fact that husband quit a \$30,000 a year job to pursue the degree. Finding that the circumstances of the case did not indicate that the pursuit of the law degree was foolish or aimless, the court rejected the wife's contention that the trial court should have increased the value of the marital estate in an amount equivalent to the income lost by husband while pursuing his law degree.⁶⁸ Nevertheless, the court noted that the trial court could take into consideration husband's enhanced earning ability in determining whether to deviate from the presumption of an even distribution of assets.⁶⁹

D. Parties Cannot Blame the Trial Court for Not Doing Their Job

During the last year, several courts have dealt with the argument that the parties' failure to present evidence of an asset or its value cannot be the basis for a claim of error on appeal. *Conner v. Conner*⁷⁰ involved an effort by wife to reopen a divorce decree entered in 1985 that was signed by the court but not entered by the clerk alleging that marital assets were omitted from the distribution in the decree.⁷¹ In dicta, the court noted that "[t]he parties have the burden to produce evidence as to the value of the assets. Therefore, impliedly, the parties also have the burden to produce evidence as to the existence of the assets."⁷²

In *Quillen v. Quillen*,⁷³ the supreme court went even further. There, husband contended that the trial court abused its discretion by failing to include in the

65. See *id.* at 944.

66. *Id.* "Disposition had not been defined by this, or any other, Indiana court. The common meaning of disposition is 'transferring to the care or possession of another.'" *Id.* (quoting BLACK'S LAW DICTIONARY 471 (6th ed. 1990)). Thus, the court observed that "'disposition' of marital property refers not to transfers or transactions that are wasteful, foolish or frivolous but to those that are unusual or out of the ordinary." *Id.* Thus, the presumption favoring an equal distribution of marital property could be rebutted by a showing that one party disposed of marital property in an unusual or extraordinary manner, albeit not a wasteful or foolish manner. See *id.*

67. 670 N.E.2d 72 (Ind. Ct. App. 1996).

68. See *id.* at 76.

69. *Id.* See IND. CODE § 31-1-11.5-11(c)(5) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-5(5)).

70. 666 N.E.2d 921 (Ind. Ct. App. 1996).

71. *Id.* at 922-24.

72. *Id.* at 926 (citation omitted).

73. 671 N.E.2d 98 (Ind. 1996).

marital estate or make a finding concerning certain accounts of wife, even though husband offered no testimony or documentation into evidence concerning the balance of the accounts.⁷⁴ The court stated, "Where the parties fail to present evidence as to the value of assets, it will be presumed that the trial court's decision is proper."⁷⁵

E. Possibility of Inheritance Not a Factor for Distribution of Assets

Practitioners frequently face the situation in *Hacker v. Hacker*.⁷⁶ In a long marriage, the parties acquired modest assets and lived on a farm owned by husband's parents. The value of the farm alone was nearly equivalent in value to the gross assets of the parties. Although the trial court properly excluded the value of the farm from the marital estate, it found that husband was the only heir of his still-living parents, and thus likely to inherit the property. Accordingly, the trial court found that a deviation from the presumption of a 50/50 distribution was justified.⁷⁷ The appellate court noted that the trial court could properly consider the husband's continued residence, rent free, on the farm in dividing the marital assets as a factor for deviation under section 31-1-11.5-11(c)(3) of the Indiana Code.⁷⁸ However, the consideration of the potential for an inheritance as a factor in the division of marital property was a matter of first impression.⁷⁹ The court reasoned that, although the trial court is required to consider certain unvested interests in allocating marital property, such as future earnings, this case did not involve a fixed right of inheritance.⁸⁰ The spouse's parents could sell the farm to satisfy their own needs, or the farm could experience unforeseeable changes in its value due to changes in the farm marketplace or governmental policy.⁸¹ Accordingly, the case was remanded for the trial court to reconsider its distribution of assets in light of the court's holding that a potential inheritance was not a factor justifying deviation.⁸²

II. POST-DECREE MATTERS

Divorcing spouses are often quite shocked to learn that even though a divorce decree may award a joint debt to one spouse, the non-obligated spouse is still legally responsible to pay the debt in the event the obligated spouse defaults on payment or files bankruptcy. Although the divorce decree should contain

74. *See id.* at 103.

75. *Id.*

76. 659 N.E.2d 1104 (Ind. Ct. App. 1995).

77. *See id.* at 1110-11.

78. *See id.* at 1111. This factor pertains to, among other matters not relevant hereto, the financial circumstances of the parties at the time the disposition of the property is to become effective.

79. *See id.*

80. *See id.* at 1111-12.

81. *See id.* at 1112.

82. *See id.* at 1113.

language providing that the obligated spouse shall hold the non-obligated spouse harmless in the event of a default or bankruptcy, the wise debtor will file to discharge the hold-harmless clause to his/her prior spouse. A discharge of that contingent liability leaves the non-obligated spouse with no remedy for reimbursement in the dissolution court.

In *White v. White*,⁸³ husband filed for bankruptcy following his dissolution and discharged certain debts he was ordered to pay in the dissolution action. Because the wife was a joint debtor on the credit cards husband discharged, she paid the debts to the creditors because he also discharged his contingent liability to wife. Following his bankruptcy, husband petitioned the court for an order requiring wife to sign a quitclaim deed to the parties' property pursuant to the decree. After a hearing, the trial court found that husband was in contempt of court for failing to hold wife harmless on certain debts that he discharged and ordered him to pay her \$10,038.70 as reimbursement on those debts. The trial court further refused to order wife to sign the quitclaim deed to the real estate.⁸⁴

The court of appeals reversed the trial court, in part, and found that because husband discharged his personal liability to wife, he was not in contempt of court for failure to either pay the debts or reimburse wife.⁸⁵ However, because the divorce decree provided that the parties would remain as co-tenants on the real estate until husband satisfied the marital debts, the trial court's refusal to order wife to quitclaim her interest in the real estate to husband was affirmed. The court reasoned that because husband had not performed the condition precedent, the wife's obligation to execute a quitclaim deed did not occur.⁸⁶

[T]he bankruptcy discharge had no effect upon the necessary performance of the condition. . . . While the discharge operated to relieve husband of his personal liability to the wife and creditors, it does not prevent her from enforcing the lien attached to the real estate before the commencement of the bankruptcy proceedings.⁸⁷

In *Voigt v. Voigt*,⁸⁸ the ex-husband petitioned the trial court to modify a spousal maintenance provision of a settlement agreement entered into by the parties which purported to resolve all claims in their dissolution of marriage action. In the agreement, the husband agreed to pay wife the sum of \$400 per week until she died, remarried or turned sixty-five. Further, the agreement stated that "[a] modification . . . of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this

83. 666 N.E.2d 459 (Ind. Ct. App. 1996).

84. *See id.* at 460.

85. *See id.*

86. *See id.* at 461.

87. *Id.* (citing *Zachary v. Zachary*, 99 B.R. 916 (Bankr. S.D. Ind. 1989); *Ruth v. First Fed. Sav. & Loan Ass'n*, 492 N.E.2d 1105 (Ind. Ct. App. 1986); *Tokash v. Tokash*, 458 N.E.2d 270 (Ind. Ct. App. 1984)).

88. 670 N.E.2d 1271 (Ind. 1996).

Agreement.”⁸⁹

The trial court granted wife’s motion to dismiss the petition. The supreme court affirmed the dismissal.⁹⁰ Chief Justice Shepard, writing for the court, acknowledged the lower court’s struggle to reconcile two earlier opinions from the court of appeals, *Pfenninger v. Pfenninger*⁹¹ and *Bowman v. Bowman*.⁹² *Pfenninger* held that “an obligation to provide spousal maintenance, even one originating in a settlement agreement, was subject to judicial modification.”⁹³ Whereas *Bowman* held that “a maintenance obligation that originated in a settlement agreement could be immunized from judicial modification by an express provision in the settlement agreement prohibiting modification.”⁹⁴ The chief justice then went on to review the modern history of court-ordered spousal maintenance, as contrasted with an agreement for spousal maintenance, and flatly stated that the narrow issue before the court was whether a court may modify an approved maintenance agreement without the consent of both parties.⁹⁵

After the enactment of the Dissolution of Marriage Act,⁹⁶ the provision for “alimony” payments from one spouse to the other was narrowed. Exactly three specific statutory grounds for court-ordered spousal maintenance have evolved in Indiana: spousal incapacity; caregiving for a disabled child; and vocational rehabilitation.⁹⁷ However, in recognizing the parties’ freedom of contract, spouses

89. *Id.* at 1272 (quoting paragraph 20 of the Agreement).

90. *See id.*

91. 463 N.E.2d 1115 (Ind. Ct. App. 1984).

92. 567 N.E.2d 828 (Ind. Ct. App. 1991).

93. *Voigt*, 670 N.E.2d at 1273 (citing *Pfenninger*, 463 N.E.2d at 1121).

94. *Id.* (citing *Bowman*, 567 N.E.2d at 830).

95. *See id.* at 1274.

96. Act of Apr. 12, 1973, No. 297, 1973 Ind. Acts 1585 (codified as amended at IND. CODE §§ 31-1-11.5-1 to -28 (1993 & Supp. 1996) (repealed 1997) (to be recodified at scattered sections of title 31 of the Indiana Code)).

97.

(e) A court may make the following findings concerning maintenance:

(1) If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself is materially affected, the court may find that maintenance for that spouse is necessary during the period of incapacity, subject to further order of the court.

(2) If the court finds a spouse lacks sufficient property, including marital property apportioned to that spouse, to provide for that spouse’s needs and that spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment, the court may find that maintenance is necessary for that spouse in an amount and for a period of time as the court deems appropriate.

(3) After considering:

(A) the educational level of each spouse at the time of marriage and at the time

have the flexibility to negotiate settlement agreements providing spousal maintenance to take advantage of tax laws or for other reasons, even though a court does not have the authority to enter these awards.⁹⁸

The court's conclusion was that if a statute does not give a court the authority to order a certain type of maintenance, then a court does not have authority to modify that maintenance award without the parties' consent. The court stated that "a court has no statutory authority to grant a contested petition to modify a maintenance obligation that arises under a previously approved settlement agreement if the court *alone* could not initially have imposed an identical obligation had the parties never voluntarily agreed to it."⁹⁹

IV. CUSTODY

In 1994 and 1996, the Indiana General Assembly revised the modification statutes governing child custody.¹⁰⁰ Due to these revisions, Indiana courts have recently reviewed a number of child custody cases.¹⁰¹ *Joe v. Lebow*¹⁰²

the action is commenced;

(B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;

(C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and

(D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment;

a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

IND. CODE § 31-1-11.5-11(e) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-7-2).

98. *Voigt*, 670 N.E.2d at 1277.

99. *See id.* at 1280 n.13. In its ruling, the court specifically reserved the question of whether a court may modify a maintenance obligation in a settlement agreement which rests upon a ground—incapacity, caregiving, rehabilitation—on which a court could have ordered the same maintenance. *Id.*

100. Indiana Code sections 31-1-11.5-22(d) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-17-2-21) and 31-6-6.1-11(e) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-14-13-9) govern the modification of child custody in divorces and paternity actions respectively.

101. It should be noted that sections 31-1-11.5-21 and 31-6-6.1-11 of the Indiana Code were modified to include a new factor a court should consider when determining custody awards: "The court shall consider all relevant factors including: . . . evidence of a pattern of domestic violence by either parent." IND. CODE § 31-1-11.5-21(a) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-17-2-8(7)); *id.* § 31-6-6.1-11(a) (Supp. 1996) (repealed 1997) (to be recodified at

reviewed the differences between the pre-1994 dissolution and paternity modification statutes and the new modification statutes. As the court pointed out, the former statutes had different standards for modification of custody in both paternity and dissolution actions. The legislature has now incorporated the same requirements in each statute so that they are identical.¹⁰³

In *Lebow*, the child lived with mother in Maryland and visited father regularly in Indiana. After having a series of physical and developmental problems as a youngster, the child's health stabilized. When the child was eleven years old, father began to have concerns about the child's obesity and depressed mood. During the period of visitation, father took the child to a physician and a social worker. Based upon their findings and his concerns, father filed a "Verified Emergency Petition for Temporary Custody" and was awarded temporary custody. Prior to the final hearing, father, mother and the child submitted to a psychological evaluation. With the help of expert testimony, the trial court found that "substantial changes" had occurred in four of the factors enumerated by statute and, accordingly, the father was granted custody.¹⁰⁴ On appeal, the mother argued that the decision was based on changes in the child's condition while in the temporary custody of her father and that there had been no substantial changes in the child's circumstances while living with her. The appellate court upheld the trial court's determination that custody should be modified, stating that both the "best interests" and "substantial change in at least one of the original factors" tests had been satisfied.¹⁰⁵ However, the appellate court emphasized that a change in custody may not be premised on a change in the child's condition occurring while in the temporary care of the moving party.¹⁰⁶ Furthermore, the court stated,

The amendments [to the modification statutes] do not do away wholesale with the longstanding policy of stability that has animated caselaw in this area, however, and this policy is not to be disregarded, but rather, reconsidered in each case with respect to whether a substantial change in the factors relevant to the best interests of the child has occurred.¹⁰⁷

*Van Schoyck v. Van Schoyck*¹⁰⁸ addresses whether the trial court can retroactively apply the modification statute. The parties in this action filed their

IND. CODE § 31-14-13-2(7)).

102. 670 N.E.2d 9 (Ind. Ct. App. 1996).

103. The court may not modify a child custody order unless:

(1) It is in the best interests of the child; and

(2) There is a substantial change in one (1) or more of the factors which the court may consider under [the provision enumerating factors relevant to determining the best interests of the child].

IND. CODE §§ 31-1-11.5-22(d), 31-6-6.1-11(e).

104. See *Joe*, 670 N.E.2d at 24.

105. *Id.* at 25.

106. *Id.* at 23.

107. *Id.* at 27.

108. 661 N.E.2d 1 (Ind. Ct. App. 1996).

petitions in May 1994, and in June 1994 and the matter was set for hearing on August 18, 1994. The trial court applied the new statute, effective July 1, 1994, in its findings of fact and order which modified the court's previous order and awarded residential custody to father.¹⁰⁹

Although the court of appeals affirmed the trial court's usage of the revised statute, the court reversed the trial court's holding that modified custody. The revised statute provides that a change in custody must be in the best interests of the child *and* there must be "a *substantial* change in one or more of the factors which were initially used to determine child custody."¹¹⁰ Because the trial court clearly stated in its findings that the child was healthy, happy, well-adjusted and comfortable, the trial court's decision was contradictory to the statute.¹¹¹ The court of appeals stated that "there was insufficient evidence of a substantial change in one or more of the factors which were initially used to determine child custody."¹¹²

In *Sills v. Irelan*,¹¹³ the Indiana Court of Appeals dealt with an issue of first impression. In this post-paternity matter, father, who was in the military and stationed in Korea, filed a petition for modification of custody. The child had been taken to the emergency room on two different occasions with serious head injuries, and the authorities were focusing their investigation on the mother's boyfriend. Although the trial court allowed the mother to retain custody, it further ordered that she have no contact with her boyfriend. The mother appealed this decision, arguing that the trial court's order violated her First Amendment freedom of association.

First, the court noted that "[i]n crafting a custody order, whether in dissolution or paternity proceedings, the paramount concern is the best interest of the child."¹¹⁴ The court continued, in response to mother's contentions, that the "freedom of association is not absolute, however, and must yield to sufficiently important governmental interests if the means are closely drawn to avoid unnecessary abridgment of associational freedoms."¹¹⁵ Because the government has a great interest in child custody cases, "the trial court's consideration of a parent's associations in a custody determination does not violate her freedom of association."¹¹⁶ The mother's right to freedom of association must yield to the best interests of the child.

The court also noted that the extent of a court's authority to restrict a parent's custody in a paternity case was an issue of first impression in Indiana. Because no statute is applicable to paternity cases, the court construed paternity and dissolution custody/visitation statutes together in its holding that restrictions can

109. See *id.* at 5.

110. *Id.*

111. See *id.*

112. *Id.* Judge Sullivan dissented with the view that the evidence did justify the trial court's decision. *Id.* at 6 (Sullivan, J., dissenting).

113. 663 N.E.2d 1210 (Ind. Ct. App. 1996).

114. *Id.* at 1213 (citing *In re Paternity of Joe*, 486 N.E.2d 1052, 1055 (Ind. Ct. App. 1985)).

115. *Id.* at 1213 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

116. *Id.* at 1213-14 (citing *In re Marriage of Diehl*, 582 N.E.2d 281, 293 (1991)).

be placed on a parent in a paternity case. The court relied on *Teegarden v. Teegarden*¹¹⁷ and on the statute.¹¹⁸ The court of appeals stated that a court “has an important interest in placing restrictions upon custody orders entered in paternity cases which serve to protect children from situations which would endanger their physical health or significantly impair their emotional development.”¹¹⁹

V. CHILD SUPPORT

In *Gilpin v. Gilpin*,¹²⁰ father filed an appeal of the trial court’s post-decree modification of child support based on two issues. Father alleged that the court failed to impute income to mother based on her new husband’s contribution to monthly expenses. The court of appeals agreed with father, citing Indiana Child Support Guideline 3(A)(2), Commentary 2(e)¹²¹ and found that the court did err by failing to impute income to mother based on her subsequent spouse’s \$1200 contribution to monthly expenses.¹²²

Further, father asserted that mother was voluntarily underemployed because her income had decreased, even though she was still employed at the same location. Father contended that mother should have income imputed to her. The decree for dissolution recognized that mother’s income fluctuated often and that the parties should recalculate child support annually. The court of appeals agreed with the trial court on this issue stating that because the mother’s income as a loan originating officer fluctuated with market rates, it would not be proper to impute income.¹²³

*Nill v. Martin*¹²⁴ discusses two of the more frequently asked questions posed to family law practitioners: “Are oral agreements to modify child support enforceable?” and “Does the support obligor have to pay child support *and* pay for college expenses?” In *Nill*, father was ordered in the decree of dissolution to pay child support in the amount of \$2100 per month for all three of his children.¹²⁵

117. 642 N.E.2d 1007 (Ind. Ct. App. 1994). For a discussion of this case, see Michael G. Ruppert & Paula J. Schaefer, *1995 Survey of Indiana Family Law*, 29 IND. L. REV. 913 (1996).

118. “[T]he court shall not restrict a parent’s visitation rights unless it finds that the visitation might endanger the child’s physical health or significantly impair his emotional development.” IND. CODE § 31-1-11.5-24(b) (1993) (repealed 1997) (to be recodified at IND. CODE § 31-17-4-2).

119. *Sills*, 663 N.E.2d at 1215.

120. 664 N.E.2d 766 (Ind. Ct. App. 1996).

121. “[R]egular and continuing payments made by a family member, subsequent spouse, roommate or live-in friend that reduce the parent’s costs for rent, utilities, or groceries, should be the basis for imputing income.” IND. CHILD SUPP. G. 3(A)(2) cmt. 2(e).

122. See *Gilpin*, 664 N.E.2d at 767. The \$1200 contribution by the new husband equaled one-half of mother’s total monthly expenses. See *id.*

123. *Id.* at 768.

124. 666 N.E.2d 936 (Ind. Ct. App. 1996).

125. “Under an in gross order, the parent must pay the total support amount until the support payments are modified by court order or all of the children are emancipated or reach the age of twenty-one years.” *Id.* at 938.

Two years later, the youngest son was killed in an automobile accident. The parties then orally agreed that father's child support should be reduced to \$1677 per month. Some years later, mother filed a petition for modification asking for more child support and that father's child support arrears be determined. Father responded by filing a motion to reduce his child support obligation and asked the court to allocate college expenses between the parties. The trial court found that the oral agreement between the parties was valid to modify father's child support obligation. However, the trial court ordered father to pay eighty-nine percent of college expenses, even though the father's college contributions did not reduce his monthly support obligations.

Father appealed the trial court's decision which ordered him to pay full child support and college expenses for his child. The court of appeals affirmed the trial court's recognition of the oral agreement because it found that the parties had a mutual, oral agreement which modified child support, and that it satisfied one of the three exceptions to the general rule that a court order is required to modify child support.¹²⁶ Citing Commentary 3(b) to the Indiana Child Support Guideline 3(E),¹²⁷ *Vore v. McFarland*¹²⁸ and *In re Marriage of Tearman*¹²⁹, the court stated that "when a parent is obligated to pay a portion of a child's college expenses in addition to child support, the trial court must consider full or partial abatement of a parent's basic child support obligation."¹³⁰ Accordingly, the court remanded this issue to the trial court for recalculation of either a full or partial abatement for those months the child is attending college.¹³¹

126. The three exceptions whereby courts will allow a credit for a child support obligation are:

- 1) support payments have been made by the obligated party even though the payments are technically nonconforming;
- 2) the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the support decree; and
- 3) the obligated parent takes the children into his or her home, assumes custody over them, provides them with necessities, and exercises parental control over their activities for such a period of time that a permanent change of custody has in effect occurred.

Id. at 939.

127. "[S]upport paid to the custodial parent should be reduced or eliminated, at least while the student is away from the household and at school." IND. CHILD SUPP. G. 3(E) cmt. 3(b). This guideline was codified at IND. CODE § 31-1-11.5-12 (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE §§ 31-16-6-1 to -8).

128. 616 N.E.2d 790, 792 (Ind. Ct. App. 1993).

129. 617 N.E.2d 974, 977 (Ind. Ct. App. 1993).

130. *Nill*, 666 N.E.2d at 940.

131. It should be noted that the child in this case was living on the college campus and not in his mother's home.

A. Social Security Disability and its Relation to Child Support

In *Scott v. Scott*,¹³² the court addressed the issue of imputing potential income to a father from a business he owns, even though he was considered “disabled” by the Social Security Administration. Father argued that the doctrine of collateral estoppel was applicable and the trial court was estopped from calculating his potential income from self-employment. Because of the father’s disability, both he and his son received monthly benefit checks. However, the father testified that his disability payments were his only income, even though he was still the owner of a used car lot. Because of his ownership of the car lot, the trial court concluded that the father was “capable of earning additional money based on his ownership of the business.”¹³³

Father argued that potential income could not be calculated for child support purposes because he was disabled and not “‘voluntarily’ unemployed or underemployed as a matter of law.”¹³⁴ The court of appeals found that even though the Social Security Administration determined that father was disabled, the trial court was permitted to calculate father’s potential income for child support purposes.¹³⁵ The court used two factors in reaching this decision: (1) whether the issues sought to be barred are the same and (2) whether the parties are the same in both proceedings.¹³⁶ The court determined that because neither the issues nor the parties were the same, the court did not have to apply the doctrine of administrative collateral estoppel.¹³⁷ The court of appeals found that father’s “employment potential and probable earnings level” were properly determined by reviewing tax returns and operating statements of the business.¹³⁸

Furthermore, the father also argued that he was entitled to a credit for the disability benefits that his son received from Social Security, due to father’s disability. The court cited *Stultz v. Stultz*¹³⁹ in its holding that the trial court was under no obligation to give father a credit for benefits that his son received.¹⁴⁰

*In re Marriage of Lang*¹⁴¹ is another child support matter where a court imputed income and refused to give credit for disability payments to a child on behalf of a parent. During the marriage, father worked as an engineer earning \$50,000 and mother earned approximately \$50,000 per year. In 1992, mother was in an automobile accident and was rendered a quadriplegic. After wife received a structured settlement of \$4.5 million and Social Security benefits, father quit his job and began spending a great deal of money and traveling extensively. Father

132. 668 N.E.2d 691 (Ind. Ct. App. 1996).

133. *Id.* at 696.

134. *Id.* at 697.

135. *See id.* at 699.

136. *See id.*

137. *See id.*

138. *Id.* at 701.

139. 659 N.E.2d 125 (Ind. 1995).

140. *Scott*, 668 N.E.2d at 703-04.

141. 668 N.E.2d 285 (Ind. Ct. App. 1996).

alleged that the trial court erroneously imputed income to him and failed to give him credit for the Social Security benefits that the minor child received. Again, the court of appeals found that a trial court's refusal to give father a credit against child support for disability benefits received by a child on behalf of the mother was not erroneous.¹⁴² With respect to imputing income to father, the court found that the child's standard of living would decline without child support from father because mother needed all of her insurance settlement proceeds to meet her needs.¹⁴³ Based on the theory that "a child should receive the same proportion of parental income that he or she would have received if the parents lived together," the court upheld the trial court's imputation of income to father and rejected father's contention that the income from mother's insurance proceeds should be included in the calculation of her gross income.¹⁴⁴

B. Accounting for Child Support Payments

Beyond the problem of calculating income in support cases, courts must also deal with issues of accounting for paid child support. In *Kovenock v. Mallus*,¹⁴⁵ the court of appeals discussed the grounds necessary for a court to order an accounting of support payments. In this case, the father filed a verified petition for an accounting with the trial court alleging that the custodial parent was not using child support payments for the benefit of the children. Father made allegations and testified that he believed mother was using child support payments to subsidize a business, take trips and purchase vehicles. The mother and her new husband had traveled to Europe and purchased two new cars, even though their alleged income was only \$18,000. However, the trial court denied father's motion, finding that the basic needs of the children were being met.¹⁴⁶ This decision was upheld by the court of appeals because "where, as here, the children's basic needs are met, some disagreement between the parties concerning whether adequate resources are being devoted to the children's particular 'wants' as distinct from their actual needs is insufficient, by itself, to support a showing of necessity for an accounting."¹⁴⁷

VI. PATERNITY

A common misconception among family law practitioners is that the two year statute of limitations for a mother or father to file a paternity action precludes the establishment of paternity at a later date.¹⁴⁸ *In re P.L.M.*¹⁴⁹ serves as a reminder

142. *Id.* at 289-90.

143. *See id.* at 289.

144. *See id.* (citing *Castaneda v. Castaneda*, 615 N.E.2d 467, 471 (Ind. Ct. App. 1993)).

145. 660 N.E.2d 638 (Ind. Ct. App. 1996).

146. *See id.* at 641.

147. *Id.*

148.

(a) Except for an action filed by the division of family and children or its agents under subsection (c), the mother, a man alleging to be the child's father, or the division of

that a mother or father, as next friend of the child, can file a petition to establish paternity even after the two year statute of limitations expires.¹⁵⁰ In this case, the two year statute of limitations had expired for father to file a paternity action. Father then filed an action for paternity as the "next friend" of the child. Mother argued that father was merely trying to "circumvent[]" the statute of limitations established by section 31-6-6.1-6(a) of the Indiana Code."¹⁵¹ The court of appeals affirmed the trial court's establishment of paternity stating: "There is no limitation provided in the statute as to who may act as the child's next friend. . . . [therefore] the applicable statutes of limitation . . . [are] of no consequence since this petition was filed by [the child]."¹⁵² Thus, now it is clearly established that both mothers and fathers can file petitions to establish paternity as the "next friend" of a child after the expiration of the two year statute of limitations.

The Indiana Supreme Court, in *Humbert v. Smith*,¹⁵³ addressed the conflict which existed between the Indiana Rules of Evidence and the paternity statute regarding admissibility of blood tests. This case was a paternity suit wherein father appealed the trial court's admission of blood tests because there was an insufficient foundation under Rule 803(6) of the Indiana Rules of Evidence.¹⁵⁴

family and children or its agents must file an action within two (2) years after the child is born

IND. CODE § 31-6-6.1-6(a) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE §§ 31-14-5-1 to -8).

149. 661 N.E.2d 898 (Ind. Ct. App. 1996).

150.

(a) A paternity action may be filed by the following persons:

. . . .

(4) A child.

A person under the age of eighteen (18) may file a petition if he is competent except for his age. A person who is otherwise incompetent may file a petition through his guardian, guardian ad litem, or next friend.

IND. CODE § 31-6-6.1-2(a)(4) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-14-4-1(5)).

A child "may file a petition at any time before he reaches twenty (20) years of age" *Id.* § 31-6-6.1-6(b) (repealed 1997) (to be recodified at IND. CODE § 31-14-5-2(b)).

151. *In re P.L.M.*, 661 N.E.2d at 899.

152. *Id.* (citing *Hood v. G.D.H.*, 599 N.E.2d 237 (Ind. Ct. App. 1992)).

153. 664 N.E.2d 356 (Ind. 1996).

154.

Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other

The mother offered the results of the paternity blood test at trial without a foundational witness, relying upon the paternity statute found at section 31-6-6.1-8(b) of the Indiana Code.¹⁵⁵ Although the trial court affirmed the admission of the evidence, the court of appeals reversed. The supreme court recognized that generally “[i]n instances where [a conflict between a rule and a statute] exists, the conflicting statute is nullified.”¹⁵⁶ Because the statute facilitated the expeditious resolution of child related issues, an exception to Evidence Rule 803(6) was created.¹⁵⁷ Thus, in paternity cases, evidence will be admissible under section 31-6-6.1-8(b) of the Indiana Code.

Recent decisions have dealt with who may file a paternity action¹⁵⁸ and when that action may be filed. The supreme court, in *K.S. v. R.S.*,¹⁵⁹ faced the issue of whether “a man who claims to be the biological father of a child, born during the marriage of the child’s mother and another man to file a paternity action while the mother’s marriage is still intact?”¹⁶⁰ The court stated that, for purposes of paternity statutes, “the term wedlock refers to the status of the biological parents of the child in relation to each other. A child born to a married woman, but

qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

IND. R. EVID. 803(6).

155.

A party may object to the admissibility of genetic test results obtained under subsection (a) if the party files a written objection at least thirty (30) days before a scheduled hearing at which the test results may be offered as evidence. If a party does not file an objection under this subsection, the test results are admissible as evidence of paternity without the necessity of:

- (1) foundation testimony; or
- (2) other proof;

regarding the accuracy of the test results.

IND. CODE § 31-6-6.1-8(b) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-14-6-2).

156. *Humbert*, 664 N.E.2d at 357 (citing *Harrison v. State*, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995)).

157. *See id.*

158.

(a) A paternity action may be filed by the following persons:

- (1) The mother or expectant mother.
- (2) A man alleging that he is the child’s biological father or that he is the expectant father of an unborn child.
- (3) The mother and a man alleging that he is her child’s biological father, or by the expectant mother and a man alleging that he is the biological father of her unborn child, filing jointly.
- (4) A child.

IND. CODE § 31-6-6.1-2 (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-14-4-1).

159. 669 N.E.2d 399 (Ind. 1996).

160. *Id.* at 400-01.

fathered by a man other than her husband, is a 'child born out of wedlock' for purposes of the statute."¹⁶¹ Thus, the supreme court found that "[n]othing in the paternity act precludes a man otherwise authorized from filing a paternity action on the basis of the mother's marital status."¹⁶² Additionally, the court upheld the trial court's decision that this failure to name a party does not render the judgment void, but rather voidable.¹⁶³ Therefore, the prior judgment does not preclude the child from later relitigating any issues with respect to its interests.¹⁶⁴ *K.S. v. R.S.* has had a profound effect on who can file an action for paternity.

In *C.J.C. v. C.B.J.*,¹⁶⁵ a woman had a child as a result of an extramarital affair. Although her husband had knowledge that he was not the biological father, he chose to have a relationship and support the child. When the child got older, a guardian ad litem, on behalf of the child, petitioned the court to establish the alleged father's paternity. The trial court dismissed the petition for paternity on public policy grounds.¹⁶⁶ On appeal, the issue was whether a child may maintain an action to establish paternity when his mother and her husband, who is not the child's biological father, remain married.¹⁶⁷ Citing *K.S. v. R.S.*, the appellate court held that a child is permitted to maintain "a paternity action against the alleged father even though the child was born during the marriage of his mother and her husband and their marriage remains intact."¹⁶⁸

*K.S. v. R.S.*¹⁶⁹ has caused appellate courts to grant a petition for rehearing in a few previous paternity decisions. In *K.T.H. v. M.K.B.*¹⁷⁰ the court found that res judicata does not apply to a case brought under the Uniform Reciprocal Enforcement of Support Act (URESA).¹⁷¹ The court also found that a matter brought under URESA cannot involve matters of custody or visitation. Instead, URESA actions are limited to the "establishment and enforcement of support obligations."¹⁷²

161. *Id.* at 402.

162. *Id.*

163. *See id.* at 405. "[O]nly judgments in which the trial court lacks subject matter jurisdiction are void; judgments in which the trial court lacks personal jurisdiction are merely voidable." *Chapin v. Hulse*, 599 N.E.2d 217 (Ind. Ct. App. 1992).

164. *See K.S.*, 669 N.E.2d at 405.

165. 669 N.E.2d 197 (Ind. Ct. App. 1996).

166. The public policy argument was asserted by the alleged father who argued that where a "marriage and the family remains intact, public policy does not favor the maintenance of a paternity action against a third party." *Id.* at 198.

167. *See id.*

168. *Id.* at 199.

169. 669 N.E.2d 399 (Ind. 1996).

170. 670 N.E.2d 199 (Ind. Ct. App. 1996).

171. In a URESA action, the court may establish paternity where necessary to enter a child support order. IND. CODE § 31-2-1-19.5 (1993).

172. *K.T.H.*, 670 N.E.2d at 119 (citing IND. CODE § 31-2-1-1 (1993); *Egan v. Bass*, 644 N.E.2d 1272, 1274 (Ind. Ct. App. 1994)).

VII. MISCELLANEOUS

The legislature modified section 31-1-11.5-7 of the Indiana Code to provide counseling in dissolution, separation, or child support matters. Parties are now statutorily permitted to petition the court to order counseling. Furthermore, the legislature provided that the court, on its own motion, can order the parties to obtain counseling, either for themselves or for a child of the marriage who is less than eighteen years of age. The legislature stipulated, however, that joint counseling cannot be required without the consent of both parties, or if there is a “demonstrated pattern of domestic violence” against one of the parties or a child of the party.¹⁷³

173.

(f) The court may require the parties to seek counseling for themselves or for a child of the parties under such terms and conditions as the court deems appropriate if:

(1) either party makes a motion for counseling in an effort to improve conditions of their marriage;

(2) a party, the child of the parties, the child’s guardian ad litem or court appointed special advocate, or the court makes a motion for counseling for the child; or

(3) the court makes a motion for counseling for parties who are the parents of a child less than eighteen (18) years of age.

However, the court may not require joint counseling of the parties under this subsection without the consent of both parties, or if there is evidence that the other party has demonstrated a pattern of domestic violence against the party or a child of a party.

IND. CODE § 31-1-11.5-7(f) (Supp. 1996) (repealed 1997) (to be recodified at IND. CODE § 31-15-4-9).

1996 FEDERAL CIVIL PRACTICE AND PROCEDURE UPDATE
FOR SEVENTH CIRCUIT PRACTITIONERS

JOHN R. MALEY*

Federal practitioners enjoyed a relatively quiet year during 1996 in federal civil procedure. Few major decisions were handed down, and statutory or rule changes were modest. Nonetheless, important developments transpired, as outlined in this Article. For ease of future reference, the topics are discussed in the order they often appear in litigation, as follows:

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I. FILING

A. Increase in Filing Fee

As part of the Federal Courts Improvement Act of 1996,¹ Congress increased the filing fee for commencing an action in federal court from \$120 to \$150.² This amendment to 28 U.S.C. § 1914(a) took effect December 18, 1996, sixty days after the date of enactment.

B. Electronic Filing—Rule 5(e)

Rule 5(e) defines “filing,” and, under the amended rule, allows the filing of papers by “electronic means” if authorized by local rules.³ The rule, as amended December 1, 1996, provides:

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1. Pub. L. No. 104-317, 110 Stat. 3847 (1996).
2. See 28 U.S.C.A. § 1914(a) (West Supp. 1997).
3. FED. R. CIV. P. 5(e).

A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.⁴

The key change in Rule 5(e) is that federal courts no longer need await the Judicial Conference to establish a procedure for electronic filing. Instead, each district court can proceed as it sees fit.

The Southern District of Indiana, for instance, has an Automation Committee chaired by Judge Tinder, and a subcommittee has been investigating electronic filing. To date, however, the Southern District has not promulgated a local rule, and it appears that it will still be some time before electronic filing is adopted here. Only a few districts have been experimenting with electronic filing.⁵

Notably, electronic service of documents by the court or by parties is not yet authorized by the Federal Rules of Civil Procedure, despite specific discussion of the issue by the Judicial Conference of the United States. The Judicial Conference has concluded—for now anyway—that “it seems better to await developing experience with electronic filing before pursuing the potentially more difficult problems that may surround electronic service.”⁶ There is, however, nothing to prevent parties from agreeing to electronic service, and there could be substantial benefits to implementing electronic service for those seeking to develop the “paperless” office.

II. SERVICE OF PROCESS

Two decisions during 1996 announced important new holdings regarding service. First, in *Panaras v. Liquid Carbonic Industries Corp.*, the Seventh Circuit joined other circuits in holding that the 120-day service mandate of Federal Rule of Civil Procedure 4(m) has two components.⁷ Specifically, when service is not effected within 120 days, the court must first ask whether there was good cause for the failure.⁸ If there was good cause (which is narrowly construed), the court has no choice but to extend the period for service.⁹

Even if there was not good cause, however, the court is not finished. The court must then ask “whether a permissive extension of time for service [is]

4. *Id.*

5. For example, the Northern District of Ohio requires electronic filing in maritime asbestos cases originating after January 1, 1996. See *Focus on Electronic Filing: Shocking Developments*, FED. LAW., June 1997, at 40.

6. ADVISORY COMMITTEE ON CIVIL RULES, JUDICIAL CONF. OF THE UNITED STATES, DRAFT MINUTES (Apr. 20, 1995) available in WESTLAW, 1995 WL 870910, at *6.

7. 94 F.3d 338, 340-41 (7th Cir. 1996).

8. *Id.* at 340.

9. *Id.*

warranted under the facts of [the] case.”¹⁰ According to the drafters of Rule 4(m), “Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.”¹¹

In *Bonaventura v. Leach*,¹² the Indiana Court of Appeals decided a service issue that affects Indiana and local federal practice. Plaintiff served defendant by certified mail, return receipt requested, at his place of business. Service was received and signed for by an employee of a consolidated mailroom serving the defendant’s office building. Defendant contended he never received the complaint and was not properly served.¹³

The Indiana Court of Appeals disagreed. It held that service was proper under Indiana Trial Rule 4.1, which allows for service upon an individual by, among other methods, “sending a copy of the summons and complaint by certified mail to [defendant’s] place of business with return receipt requested and a return showing receipt of the letter.”¹⁴ The court rejected the argument that defendant himself must receive and sign for the complaint and summons.¹⁵ The court explained, “If Bonaventura acquiesced in the mail system which allowed a hospital employee to sign for certified mail, then service of process was satisfactory.”¹⁶

The holding is important to federal practice in Indiana because Federal Rule of Civil Procedure 4(e)(1) allows service, among other methods, pursuant to the law of the forum state.

III. JURISDICTION

A. Diversity Jurisdiction Increased To \$75,000

As part of a bill that received sparse media coverage, Congress recently increased the amount-in-controversy requirement for diversity jurisdiction. Specifically, under the Federal Courts Improvements Act of 1996, Congress amended 28 U.S.C. § 1332 to increase diversity jurisdiction from amounts exceeding \$50,000 to amounts exceeding \$75,000.¹⁷ The Act was signed by President Clinton October 19, 1996, and the diversity increase took effect ninety days later, on January 17, 1997.

The following maxims should be of assistance as practitioners cope with this amendment:

- 1) “Plaintiffs receive the benefit of all doubt: a court may not dismiss the claim unless it ‘appear[s] to a legal certainty that the claim is

10. *Id.* at 341.

11. *Id.* (quoting FED. R. CIV. P. 4(m) advisory committee’s note).

12. 670 N.E.2d 123 (Ind. Ct. App. 1996), *trans. denied*.

13. *Id.* at 126.

14. *Id.* at 126-27.

15. *Id.* at 127.

16. *Id.*

17. 28 U.S.C.A. § 1332 (West Supp. 1997).

really for less than the jurisdictional amount.”¹⁸

- 2) However, a party claiming diversity jurisdiction “cannot just appeal to the judge’s druthers; [that party] must show how the rules of law, applied to the facts of [the] case, could produce such an award.”¹⁹
- 3) The amount in controversy must *exceed* the statutory minimum.²⁰
- 4) Prejudgment interest and attorneys’ fees may be included in the amount in controversy *if* there is a legal basis for such awards.²¹
- 5) In declaratory judgment or injunctive relief cases, the amount in controversy is measured by the value of the right or interest at issue.²²

B. Removal

As part of a separate bill, Congress amended 28 U.S.C. § 1447(c) dealing with removal and remands. The old version provided in part: “A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a).”²³

The new version reads: “A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).”²⁴ The legislative history of this amendment²⁵ explains cryptically:

The intent of the Congress is not entirely clear from the current wording of 28 U.S.C. § 1447(c), and it has been interpreted differently by different

18. *Schlessinger v. Salimes*, 100 F.3d 519, 521 (7th Cir. 1996) (alteration in original) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)). *But see* *Roman v. Grafton Transit, Inc.*, 948 F. Supp. 736, 788 (N.D. Ill. 1996) (using “reasonable probability” as standard); *Reason v. General Motors Corp.*, 896 F. Supp. 829, 934 (S.D. Ind. 1995) (same).

19. *Schlessinger*, 100 F.3d at 521 (citation omitted).

20. *Bradford Nat’l Life Ins. Co. v. Union State Bank*, 794 F. Supp. 296, 297-98 (E.D. Wis. 1992) (no diversity jurisdiction where amount at issue was exactly \$50,000 under pre-amended § 1332).

21. *Id.* at 298.

22. *Gould v. Artisoft, Inc.*, 1 F.3d 544, 547 (7th Cir. 1993). *See also* *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977) (“In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.”); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 256-67 (5th Cir. 1996); *Freeman v. Sport Car Club, Inc.*, 51 F.3d 1358, 1362 (7th Cir. 1995).

23. 28 U.S.C. § 1447(c) (1994).

24. 28 U.S.C.A. § 1447(c) (West Supp. 1997).

25. HOUSE JUDICIARY COMM., UNITED STATES DISTRICT COURT: REMOVAL PROCEDURE, H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. 3417.

courts. S. 533 clarifies the intent of Congress that a motion to remand a case on the basis of any defect other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under 28 U.S.C. § 1446(a).²⁶

It is the author's opinion that this amendment makes no significant change, and that for most cases the analysis and results under § 1447(c) will be the same.

C. Class Actions/Counterclaims/Supplemental Jurisdiction

Judge Easterbrook's decision in *Channell v. Citicorp National Services, Inc.*,²⁷ contains a complicated discussion of the role of counterclaims in class actions and touches on supplemental jurisdiction as well. The decision is an important read for class-action practitioners. For everyone else, the key points from *Channell* are that: (a) 28 U.S.C. § 1367²⁸ permits district courts to entertain an action against a pendent party even without a claim exceeding \$50,000 (now \$75,000);²⁹ (b) § 1367 permits the adjudication of a claim by a pendent party that does not have a federal question or jurisdictional basis;³⁰ and (c) § 1367 has extended supplemental jurisdiction to the limits of Article III, meaning that "[a] loose factual connection between the claims' can be enough."³¹

D. Federal Question Jurisdiction

In *Sebring Homes Corp. v. T.R. Arnold & Associates, Inc.*,³² Judge Miller provided a good overview of federal question jurisdiction. Plaintiff makes recreation vehicles and manufactured homes. Defendant provided consulting services, some of which were regulated by federal law.³³ The federal government sued plaintiff in a separate action alleging violations of the Act. Plaintiff then filed a separate indemnity action in state court against defendant-consultant. The consultant then removed the indemnity action asserting federal question jurisdiction.³⁴

On its own motion, shortly before a bench trial, the court ordered briefing on jurisdiction, and then remanded the case for lack of federal question jurisdiction.³⁵ Noting that federal jurisdiction must exist from the face of the complaint, Judge

26. *Id.* at 2, reprinted in 1996 U.S.C.C.A.N. at 3418.

27. 89 F.3d 379 (7th Cir. 1996).

28. (1994).

29. *Id.* at 385.

30. *Id.*

31. *Id.* (quoting *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995)).

32. 927 F. Supp. 1098 (N.D. Ind. 1995).

33. 42 U.S.C. § 5401 (1994).

34. *Sebring*, 927 F. Supp. at 1099-1100.

35. *Id.* at 1100, 1104.

Miller ruled that plaintiff's claims did not arise under federal law.³⁶ Instead, the claims merely alleged an indemnity claim, which is a creature of state law.³⁷

E. Abstention and Remand

In *Quackenbush Insurance Co. v. Allstate*,³⁸ the Supreme Court decided two important, but technical, questions of federal procedure. First, the Court held that an abstention-based remand of an action to state court *is* appealable as a collateral order under 28 U.S.C. § 1291,³⁹ notwithstanding the "no review" provisions of 28 U.S.C. § 1447(d).⁴⁰ Second, the Court held that federal courts have the power to dismiss or remand cases based on abstention principles when the relief sought is equitable or otherwise discretionary but not if it is a damages action.⁴¹

IV. DIVISIONAL TRANSFER

Motions to transfer actions from one district to another, though rarely granted, are often filed. A rare, but possibly more successful motion, is the motion to transfer between *divisions* within a district.

Such a motion was filed by the defense in *Maddry v. NBD Bank*, and transfer from the Hammond Division to the South Bend Division of the Northern District of Indiana was granted by Magistrate Judge Rodovich.⁴² In *Maddry*, the plaintiffs filed a diversity action in the Hammond Division.⁴³ NBD's principal office was in Elkhart, within the South Bend Division. NBD sought to move the action to the South Bend Division, pursuant to 28 U.S.C. § 1404(a),⁴⁴ contending that it would be more convenient for the parties and witnesses to litigate in South Bend, and asserting that the action was related to a prior action involving NBD which was litigated in that division.⁴⁵

Judge Rodovich agreed in a case of first impression in the Seventh Circuit, reasoning that although venue was proper anywhere in the Northern District, including Hammond, it would be more convenient for the parties and witnesses to litigate in South Bend.⁴⁶ Indeed, none of the parties or witnesses resided in the Hammond Division, and none of the actions complained of occurred in the Hammond Division.⁴⁷ By contrast, NBD was located in the South Bend Division,

36. *Id.* at 1102.

37. *Id.*

38. 116 S. Ct. 1712 (1996).

39. (1994).

40. *Id.* at 1717-20.

41. *Id.* at 1723.

42. *Maddry v. NBD Bank*, No. 2:94-cv-155 (N.D. Ind. Feb. 14, 1996) (order granting motion to transfer).

43. *Id.* at 1.

44. (1994).

45. *Id.* at 2.

46. *Id.* at 8.

47. *Id.* at 7-8.

potential defense witnesses were located in the South Bend Division, and plaintiffs resided in Wisconsin and California, thus requiring them to travel substantial distance regardless of whether the action proceeded in South Bend or Hammond.⁴⁸ In balancing these factors, Judge Rodovich concluded that South Bend was a more appropriate forum.⁴⁹

V. JOINDER

In *Hammond v. Clayton*,⁵⁰ the Seventh Circuit applied Federal Rule of Civil Procedure 19 to hold that certain parties were not indispensable. Plaintiff was purchasing a farm on contract from sellers. Plaintiff claimed that defendants maliciously prosecuted him, leading to his inability to make payments on the farm. Plaintiff contended that the sellers were indispensable parties under Rule 19.⁵¹

The Seventh Circuit disagreed, holding that complete relief could be accorded to plaintiff without the seller in the case.⁵² Specifically, if plaintiff prevailed against defendants, “his damages award would reflect any loss of property caused by [defendants].”⁵³

VI. DISCOVERY

A. *Ex Parte Interviews*

Several recent federal decisions interpret Rule 4.2 of the Indiana Rules of Professional Conduct (RPC) and its potential effect on ex parte interviews with former employees. First, in *Owen v. Kroger Co.*,⁵⁴ Magistrate Judge Shields denied Kroger’s motion to bar testimony from one of its former managers due to plaintiff counsel’s ex parte interview with the manager.⁵⁵ The case involved plaintiff’s claim for breach of an alleged contract. The Kroger manager who had allegedly made the contract was no longer employed by Kroger. Prior to filing suit, plaintiff’s counsel interviewed the former manager, inquiring about the discussions that allegedly gave rise to a contract.⁵⁶

Suit was filed, and during discovery plaintiff’s counsel produced a transcript of the ex parte interview. Defense counsel sought to exclude the manager from testifying, or alternatively sought return of all copies of the transcript, due to a claimed violation of RPC 4.2 and the comments thereunder, which imply that ex parte interviews of those with managerial authority or who can bind the company

48. *Id.* at 8.

49. *Id.* at 5-8.

50. 83 F.3d 191 (7th Cir. 1996).

51. *Id.* at 192.

52. *Id.* at 195.

53. *Id.*

54. 936 F. Supp. 579 (S.D. Ind. 1996).

55. *Owen v. Kroger Co.*, No. IP94-2103-CB/S (S.D. Ind. Apr. 8, 1996) (order on motion to bar testimony due to ex parte interview).

56. *Id.* at 1.

are improper.⁵⁷

In denying the defense motion, Judge Shields reasoned that Rule 4.2 did not preclude the ex parte interview. Following the majority view across the country,⁵⁸ Judge Shields concluded that the former manager was not a "party" under Rule 4.2.⁵⁹ Judge Shields also followed *Brown v. St. Joseph County*, which held that Rule 4.2 does not apply to former employees.⁶⁰

Similarly, in *Bussell v. Minix*,⁶¹ Judge Miller granted plaintiff counsel's request to conduct ex parte interviews of three defense employees prior to deposing them. As to two of the co-employees, Judge Miller succinctly ruled that they had no managerial authority and thus could be interviewed ex parte.⁶² However, Judge Miller specifically instructed counsel to comply with RPC 4.3.⁶³ Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.⁶⁴

As to the third employee, the chief of detectives for the county, defendant argued that he had managerial authority such that he should not be subject to ex parte interview.⁶⁵ As a matter of proof, Judge Miller found that the chief detective had no managerial authority and that his actions could not be imputed to the defendant.⁶⁶ Judge Miller, therefore, allowed the ex parte interview.⁶⁷

B. Ex Parte Physician Interviews

In a related context, in *Shots v. CSX Transportation, Inc.*,⁶⁸ Magistrate Judge Hussmann ruled that defense counsel could conduct an ex parte interview of plaintiff's physician where plaintiff had put his medical condition at issue and had not indicated any medical condition that was unrelated to his accident or that was "potentially embarrassing or ruinous."⁶⁹ Judge Hussmann also ordered plaintiff

57. *Id.* at 2.

58. This issue has not yet been addressed by an Indiana appellate court.

59. *Owen*, No. IP94-2103-CB/S, at 3-4.

60. 148 F.R.D. 246, 252-53 (N.D. Ind. 1993).

61. 926 F. Supp. 809 (N.D. Ind. 1996)

62. *Id.* at 810.

63. *Id.*

64. IND. R. PROF. COND. 4.3.

65. *Bussell*, 926 F. Supp. at 810.

66. *Id.* at 811.

67. *Id.*

68. 887 F. Supp. 206 (S.D. Ind. 1995).

69. *Id.* at 207-08.

to execute an authorization for release of medical information.⁷⁰

Judge Hussmann reasoned that federal courts have discretion to allow ex parte interviews of treating physicians.⁷¹ Although Indiana law precludes such interviews,⁷² Judge Hussmann ruled that even in diversity cases federal law governs discovery.⁷³ Although Judge Hussmann encouraged defense counsel to offer plaintiff's counsel the opportunity to be present, he stopped short of mandating that plaintiff's counsel be present.⁷⁴

C. Admissions

In *Kohler v. Leslie Hindman, Inc.*,⁷⁵ the Seventh Circuit held that an admission in one case "cannot be a judicial admission in another. It can be evidence in the other lawsuit, but no more."⁷⁶

In *Walsh v. McCain Foods Ltd.*,⁷⁷ the Seventh Circuit held that admissions made by one party are not admissions of another party, unless there was an agency relationship at the time of the admission. In this case, one of the plaintiffs had failed to respond to requests for admission, and defendant attempted to introduce a resultant admission at trial against another plaintiff. Because there was no longer an agency relationship between the plaintiffs at the time the admission was deemed to have been made, the Seventh Circuit held that the trial court correctly excluded the admission at trial.⁷⁸

D. Is Personal Service Required For Third-Party Discovery?

Rule 30 allows for depositions of any person, and "attendance of witnesses may be compelled by subpoena as provided in Rule 45."⁷⁹ Rule 34 allows for requests for production of documents to be used against parties,⁸⁰ and then provides that nonparties "may be compelled to produce documents . . . as provided in Rule 45."⁸¹ How, then, is service to be effected under Rule 45?

Rule 45(b)(1) in turn provides that a "subpoena may be served by any person who is not a party and is not less than 18 years of age," and adds that "[s]ervice of a subpoena . . . shall be made by delivering a copy thereof to such person."⁸² In

70. *Id.* at 207.

71. *Id.* at 208.

72. *See Cua v. Morrison*, 626 N.E.2d 581 (Ind. Ct. App. 1993), *aff'd*, 636 N.E.2d 1248 (Ind. 1994).

73. *Shots*, 887 F. Supp. at 207.

74. *Id.* at 208.

75. 80 F.3d 1181 (7th Cir. 1996).

76. *Id.* at 1185 (citation omitted).

77. 81 F.3d 722 (7th Cir. 1996).

78. *Id.* at 726-27.

79. FED. R. CIV. P. 30(a)(1).

80. FED. R. CIV. P. 34(a).

81. FED. R. CIV. P. 34(c).

82. FED. R. CIV. P. 45 (b)(1).

recent years several courts have addressed whether such "delivery" requires personal service. As summarized below, there is a split of authority on this issue.

E. The Split

Within the Seventh Circuit, *Doe v. Herseman*⁸³ is the only reported decision on the subject of whether "delivery" under Rule 45(b)(1) requires personal service. In a well-reasoned opinion, Judge Moody held that service of a subpoena pursuant to Federal Rule of Civil Procedure 45(b)(1) can be accomplished by certified mail.⁸⁴ In reaching this holding, Judge Moody noted the following key points:

- 1) The Federal Rules of Civil Procedure are to be interpreted to "secure the just, speedy, and inexpensive determination of every action" according to Rule 1;⁸⁵
- 2) Nothing in Rule 45(b)(1) expressly requires personal service;⁸⁶
- 3) Delivery is defined in *Black's* as "the act by which the res or substance thereof is placed within the actual . . . possession or control of another";⁸⁷
- 4) Delivery by certified mail assures "delivery" of the document;⁸⁸
- 5) The drafters of the Rules knew how to use the term "personal service" as reflected by Rule 4(e)(1), but chose not to use that term here.⁸⁹

Similarly, in the case, *In re Shur*,⁹⁰ the court held that Rule 45(b)(1) does not require personal service of subpoenas on nonparties. Expressly following Judge Moody's decision in *Doe*, the court rejected the holdings of other district court decisions mandating personal service.⁹¹

By contrast, several 1995 decisions require personal service. In *Smith v. Midland Brake Inc.*,⁹² the court summarily stated that service of a subpoena shall not be by mail, citing *FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*.⁹³ As Judge Moody pointed out in *Doe*, however, the D.C. Circuit's statement in

83. 155 F.R.D. 630 (N.D. Ind. 1994).

84. *Id.*

85. *Id.* (quoting FED. R. CIV. P. 1).

86. *Id.*

87. *Id.* (quoting BLACK'S LAW DICTIONARY 428 (6th ed. 1990)).

88. *Id.*

89. *Id.* at 630-31.

90. 184 B.R. 640 (Bankr. E.D.N.Y. 1995).

91. *Id.* at 642.

92. 162 F.R.D. 683 (D. Kan. 1995).

93. 636 F.2d 1300 (D.C. Cir. 1980).

FTC that personal service is required is dicta.⁹⁴ Similarly, in the case, *In re Nathurst*, the court summarily stated, “It needs no elaborate citation of authorities to support the proposition which is self-evident that a subpoena cannot be effectively served by mail even if sent by certified mail.”⁹⁵

F. The Practical Answer

Doe, the Northern District of Indiana decision appears to be the best reasoned approach to this issue, and is likely to be followed within federal courts in Indiana. Elsewhere, however, the issue is unresolved. When there is no urgency and the third-party is not expected to resist, delivery by any reasonable means, such as certified mail, FedEx, UPS, or even first-class mail, will ordinarily suffice. When the third-party might resist the subpoena, however, personal service would be advisable to avoid any dispute, particularly when the subpoena commands attendance at a deposition. At a minimum, certified mail should be used.

G. Case Management/Disclosure

In *Jones-Bey v. Wright*,⁹⁶ a pro se plaintiff failed to file witness lists, exhibits lists, and contentions in compliance with the court’s scheduling order issued pursuant to Rule 16(b). Judge Sharp adopted the magistrate judge’s report and recommendation⁹⁷ and denied defendant’s motion to dismiss, but precluded plaintiff from calling any witnesses other than himself.⁹⁸ The magistrate’s report found no “good cause” for the failure to file.⁹⁹ The report further noted that “deadlines must have teeth,” and that pro se litigants do not have unbridled license to disregard clearly communicated court orders.¹⁰⁰

VII. EXPERTS

A. Expert Reports

In *First Source Bank v. First Resource Federal Credit Union*,¹⁰¹ Judge Miller addressed several important issues in connection with expert reports, which are now mandatorily disclosed under Rule 26(a)(2).¹⁰² First, Judge Miller ruled that where an economic expert’s report stated merely that the expert “‘is expected to testify concerning plaintiff’s calculation of pre-judgment interest,’” that portion

94. *Doe*, 155 F.R.D. at 631.

95. *In re Nathurst*, 183 B.R. 953, 955 (Bankr. M.D. Fla. 1995).

96. No. 3:94CVO218AS, 1996 WL 441786 (N.D. Ind. July 22, 1996).

97. *Id.* at *1.

98. *Id.* at *5.

99. *Id.* at *3.

100. *Id.* at *4.

101. 167 F.R.D. 61 (N.D. Ind. 1996).

102. FED. R. CIV. P. 26(a)(2).

of the report was deficient.¹⁰³ Moreover, Judge Miller precluded the expert from testifying at trial to pre-judgment interest.¹⁰⁴ The court explained, “[L]isting a subject on which an expert is expected to testify is not the same as giving the expert’s opinion and bases for the opinion.”¹⁰⁵

Second, Judge Miller ruled that there is no inherent opportunity to cure deficient expert reports.¹⁰⁶ Although sympathetic to the argument that there should be a chance to cure defects in expert reports, the court explained that “no mechanism exists for a disclosing party to test the sufficiency of its disclosure.”¹⁰⁷ Instead, “[t]he disclosing party must simply await a motion in limine or trial objection, and hope to argue successfully that the disclosure was adequate.”¹⁰⁸ Judge Miller concluded with this important warning: “[C]ounsel would seem well advised to err on the side of over-inclusiveness in making disclosures under Rule 26(a).”¹⁰⁹

In *Walsh v. McCain Foods Ltd.*,¹¹⁰ the Seventh Circuit found no error in a district court’s decision to limit an expert’s testimony at trial to the substance addressed in his report and deposition. The Seventh Circuit explained:

Rule 26(a)(2) explicitly requires an expert witness to provide a report containing his opinions as well as the basis and reasons for those opinions. Subsections (a)(2)(C) and (e)(1) of that rule require that the expert’s disclosure be supplemented if there are any modifications or additions to the information previously disclosed. This duty extends “both to the information contained in the expert’s report and to the information provided through deposition of the expert.” Additionally, if a party fails to comply with Rule 26, a trial court has the discretion to impose sanctions, including the exclusion of evidence. Thus, the district court’s decision to limit [the expert’s] testimony to that previously disclosed to plaintiffs in his report and deposition was nothing more than a warning that the court would not allow [defendant] to violate Rule 26 at trial. [Defendant] cannot legitimately argue that [the expert] should have been allowed to testify about matters not previously disclosed to the plaintiffs.¹¹¹

B. Dealing With Daubert

As discussed in prior Articles, the Supreme Court’s 1993 decision in *Daubert*

103. *First Source Bank*, 167 F.R.D. at 66.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 67.

108. *Id.*

109. *Id.*

110. 81 F.3d 722 (7th Cir. 1996).

111. *Id.* at 727 (citations omitted).

v. Merrell Dow Pharmaceuticals, Inc.,¹¹² changed the standard for the admissibility of expert testimony. The old *Frye*¹¹³ rule of “general acceptance” was abandoned in favor of a more flexible, but probably more restrictive standard focusing on the scientific, technical, or otherwise specialized basis of the testimony.¹¹⁴ *Daubert* also emphasized the district judge’s responsibility to serve as “gatekeeper” and screen out expert testimony that does not satisfy the *Daubert* standards.¹¹⁵

As expected, there has been much litigation on the issue since *Daubert*, and the real battlefield is in the trial court. The following cases illustrate the profound effects of *Daubert*.

1. *Air Jordan*.—In *Tucker v. Nike, Inc.*,¹¹⁶ which is a unique application of the teachings of *Daubert*, Magistrate Judge Springmann rejected a podiatrist’s opinion that an Air Jordan sneaker caused plaintiff’s achilles tendon to rupture. In *Tucker*, plaintiff ruptured his achilles tendon while playing basketball in Nike Air Jordan sneakers (“it must be the shoes”). Plaintiff sued Nike alleging that the shoes were defective in design. To support his claim, plaintiff submitted the expert testimony of a podiatrist, and offered no other evidence of causation.¹¹⁷

Nike moved for summary judgment, contending in part that the podiatrist’s opinions were inadmissible. In a well-reasoned opinion, Judge Springmann agreed.¹¹⁸ After outlining the *Daubert* standards,¹¹⁹ Judge Springmann went straight to the podiatrist’s methodology, which was limited to the following:

[The doctor] testified that, in his opinion, the back tab pull caused [plaintiff’s] achilles tendon to rupture. [His] hypothesis was based on his examination of the shoe in this case. When [he] examined the shoe, he used a ruler, his eyes and his hands. He also brought to bear his many years of experience as a podiatrist. [The doctor] performed no other tests on the shoe. Based upon this examination, he concluded that the shoe was defective. . . . [and that] the defective design of the back tab pull caused [plaintiff’s] achilles tendon to rupture.¹²⁰

In rejecting the podiatrist’s opinion, Judge Springmann noted that the “most troubling aspect of [the doctor’s] testimony is his failure to consider other causes of the accident.”¹²¹ Indeed, although he acknowledged in his deposition that many factors can cause the achilles tendon to rupture, the podiatrist never sought to

112. 509 U.S. 579 (1993).

113. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

114. *Daubert*, 509 U.S. at 586-87.

115. *Id.* at 596-97.

116. 919 F. Supp. 1192 (N.D. Ind. 1995).

117. *Id.* at 1193.

118. *Id.* at 1198.

119. *Id.* at 1195-96.

120. *Id.* at 1196.

121. *Id.*

exclude those factors as possible causes in this case.¹²² Accordingly, the court held that his opinions were nothing more than subjective belief and unsupported speculation.¹²³

In addition, the podiatrist's opinion did not "fit" the case, as required by *Daubert*.¹²⁴ The podiatrist opined that the Air Jordan shoes were defective by putting excessive pressure on the tendon during jumping.¹²⁵ However, the record evidence—including from plaintiff's own deposition—established that plaintiff was *not* jumping when he was injured.¹²⁶ The court thus concluded that the "expert's opinion, no matter how scientific or unscientific, does not fit the factual situation which this case presents."¹²⁷

2. *Slip and Fall*.—Similarly, in *Buckner v. Sam's Club, Inc.*,¹²⁸ a slip-and-fall case, the Seventh Circuit affirmed Judge Tinder's exclusion of proffered expert testimony regarding causation. Plaintiff claimed to have slipped on a small object on the floor, but that object was never seen or found.¹²⁹ In resisting summary judgment, Plaintiff offered an affidavit from a safety management expert.¹³⁰ The expert opined that Plaintiff had fallen "as a direct result of stepping on a watch that had been dropped or knocked off the display."¹³¹ In granting and affirming summary judgment for Sam's Club, both Judge Tinder and the Seventh Circuit excluded this conclusory affidavit because it "provided no scientific or technical knowledge that would assist the trier of fact."¹³² Both cases correctly applied *Daubert* and properly excluded inadmissible expert testimony. Counsel offering expert testimony must ensure that the rigors of *Daubert* are satisfied.

VIII. SUMMARY JUDGMENT

A. Introduction

In *Bohac v. West*,¹³³ the Seventh Circuit held that ordinary notice and an opportunity to present evidence generally must be given to a nonmovant on a motion to dismiss that is converted to a motion for summary judgment. But, when such notice would be futile due to the inability to present a factual issue, summary judgment is appropriate.¹³⁴

122. *Id.*

123. *Id.* at 1197.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1198.

128. 75 F.3d 290 (7th Cir. 1996).

129. *Id.* at 291-92.

130. *Id.* at 292.

131. *Id.*

132. *Id.* at 293.

133. 85 F.3d 306 (7th Cir. 1996).

134. *Id.* at 312.

In *Owen v. Kroger Co.*,¹³⁵ Chief Judge Barker held that a nonmovant had complied with the requirement of Local Rule 56.1 that it provide a “statement of genuine issues.” The nonmovant had met the rule’s requirement by incorporating a brief statement of genuine issues with record citations in its opposition brief.¹³⁶

B. Summary Judgment Deadlines

In a recent opinion that begins by quoting a 1959 song, “What a difference a day makes . . . twenty-four little hours,” the Seventh Circuit affirmed summary judgment for the City of Indianapolis in a civil-rights action.¹³⁷ The case is a reminder that, although federal judges are often very patient, they can be pushed too far on missing deadlines, and the consequences of late filings can be severe.

The case, filed in the Southern District of Indiana in 1991, proceeded through “two years of swimming in the sea of discovery.”¹³⁸ Then, on January 3, 1994, the City filed a properly supported motion for summary judgment.¹³⁹ Plaintiff’s response was due fifteen days later pursuant to Southern District of Indiana Local Rule 56.1.¹⁴⁰ Plaintiff sought an extension, and, over the City’s objection, Judge Tinder gave plaintiff until February 22, 1994, to respond.¹⁴¹

Plaintiff did not meet the deadline. This time he sought an extension due to an intervening federal holiday and the number of exhibits he desired to file. Over the City’s objection, Judge Tinder granted the extension until March 1, 1994.¹⁴²

On that date, plaintiff filed a brief, but it did not include affidavits or other documentary evidence contravening the movant’s evidence as required by Local Rule 56.1. Citing a “catastrophic computer failure,” plaintiff filed an “emergency” motion asking for one extra day to file his evidence. Some supporting documentation was filed the next day, but the filings did not end. A week later, an amended/response brief, an amended designation of materials and an amended statement of genuine issues were filed. The City objected and moved to strike the materials.¹⁴³

In a comprehensive decision, Judge Tinder granted summary judgment, and in so doing addressed the belated filings.¹⁴⁴ First, the court denied the “emergency” motion for more time.¹⁴⁵ Second, he granted the motion to strike the new supporting materials, but denied the motion to strike the amended brief.¹⁴⁶

135. *Owen v. Kroger Co.*, 936 F. Supp. 579, 581 n.1 (S.D. Ind. 1996).

136. *Id.*

137. *Spears v. City of Indianapolis*, 74 F.3d 153 (7th Cir.1996).

138. *Id.* at 156.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

The court thus did not consider evidence filed after the March 1 due date, and accordingly accepted the City's facts as true.¹⁴⁷

On appeal, the Seventh Circuit approved of Judge Tinder's rulings, finding no abuse of discretion.¹⁴⁸ The panel noted that we "live in a world of deadlines," and that the "practice of law is no exception."¹⁴⁹ Although both Judge Tinder and the Seventh Circuit expressed sympathy with counsel's problems, the Seventh Circuit wrote, "[I]t seems to us that the problem was really that he waited until the last minute to get his materials together. [He] apparently neglected the old proverb that 'sooner begun, sooner done.'"¹⁵⁰ The Seventh Circuit added that "[d]eadlines, in the law business, serve a useful purpose and reasonable adherence to them is to be encouraged."¹⁵¹

The lessons of *Spears* are obvious, but are worth repeating. Deadlines in federal court should not be taken lightly. When it appears that an extension is necessary, it should be sought well prior to the deadline if possible, and the request should include the reasons an extension is necessary. Notably, the *Spears* decision is not the first of its type; Indiana courts are strict on summary judgment, forbidding late designation of evidence at the hearing.

IX. MOTIONS TO RECONSIDER

In *Atchley v. Heritage Cable Vision Associates*,¹⁵² Judge Miller denied a motion to reconsider. In so doing, he noted the general standards for a motion to reconsider, which is denied unless "it clearly demonstrates manifest error of law or fact or presents newly discovered evidence."¹⁵³ A motion that simply recasts and clarifies prior arguments ordinarily will not be granted.¹⁵⁴

X. TRIAL

Federal Rule of Civil Procedure 43(a) was amended in 1996 to allow for testimony at trial from a remote location. Specifically, Rule 43(a) provides in part, "The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."¹⁵⁵

The comments to the amendment reflect a continuing preference for live testimony or for a prior deposition to be used at trial.¹⁵⁶ Nonetheless, the comments recognize that in some situations "remote" testimony, by audio and

147. *Id.*

148. *Id.* at 157.

149. *Id.*

150. *Id.*

151. *Id.*

152. 926 F. Supp. 1381 (N.D. Ind. 1996), *aff'd*, 101 F.3d 495 (7th Cir. 1996).

153. *Id.* at 1383.

154. *Id.* at 1383-84.

155. FED. R. CIV. P. 43(a).

156. FED. R. CIV. P. 43(a) advisory committee's notes.

video or by audio alone, might be justified. The best example, the comments note, would be where a witness is unexpectedly ill during trial and unable to travel. Prisoner litigation was also cited as a possible use for remote testimony.

XI. COSTS

Chief Judge Barker's recent decision in *Endress & Hauser*, provides an excellent overview of recoverable costs under Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920.¹⁵⁷ Among the court's holdings are the following:

- 1) costs were recoverable for three copies of all papers because those copies were filed with the court and served on opposing counsel;¹⁵⁸
- 2) introduction of a deposition at trial is not a prerequisite for recovering transcript costs;¹⁵⁹
- 3) costs for a second copy of the trial transcript were denied where there was no showing that the second copy was for anything other than counsel's convenience;¹⁶⁰
- 4) costs for enlarging and mounting exhibits for trial were recoverable;¹⁶¹
- 5) copies for five sets of exhibits used by the court and the parties were recoverable;¹⁶² and
- 6) Westlaw and Lexis costs were denied consistent with Seventh Circuit authority holding that such expenses are more in the nature of attorneys' fees than costs.¹⁶³

XII. SANCTIONS

A. Sanctions for Over-Sized Brief

Upon seeing this headline, all federal litigators no doubt take pause. All should, but there is more to Magistrate Judge Rodovich's order in *Boatright*¹⁶⁴ than just an oversized brief.

Plaintiff brought an employment discrimination claim.¹⁶⁵ The employer moved for summary judgment. In response, plaintiff's counsel filed a brief that, upon first review, would appear to comply with the twenty-five-page limit of

157. *Endress & Hauser, Inc. v. Hawk Measurement Sys., Ltd.*, 922 F. Supp. 158 (S.D. Ind. 1996).

158. *Id.* at 160.

159. *Id.* at 161.

160. *Id.* at 162.

161. *Id.* at 162-63.

162. *Id.* at 163.

163. *Id.* at 163-64.

164. *Boatright v. D & M Mfg., Inc.*, No. 2:95-cv-125 (N.D. Ind. Apr. 16, 1996) (order denying defendant's motion to strike plaintiff's 31-page brief).

165. *Id.* at 2.

Northern District of Indiana Local Rule 7.1. Indeed, the last page of the brief containing counsel's signature was numbered "25."¹⁶⁶

The first five pages of the brief, however, were not numbered. The sixth page contained the number "2," with the remaining pages numbered consecutively to and including the last page, which was designated "25." The brief actually contained thirty-one pages.¹⁶⁷

The employer moved to strike plaintiff's opposition brief, based on a violation of the twenty-five-page limit.¹⁶⁸ In a seven-page order, Judge Rodovich denied the motion to strike, but reprimanded plaintiff's counsel and ordered him to show cause why sanctions should not be imposed.¹⁶⁹

His order began by noting that the pending motion "deals with an affront to the integrity of the judicial system."¹⁷⁰ After reciting the basic "numbering" facts and procedural history, Judge Rodovich criticized plaintiff counsel's response to the motion to strike which accused defense counsel of "sidetrack[ing]" and "dup[ing]" the court.¹⁷¹ The court wrote:

This is a classic example of the guerilla tactics which are appearing with increasing regularity in the practice of law. Rules, both substantive and procedural, are designed to be followed by the parties and their attorneys. Attorneys should not be criticized for complying with the Federal Rules . . . or the Local Rules. Nor should they be criticized for expecting other attorneys to do likewise.¹⁷²

Things got worse from here for plaintiff's counsel. Rather than acknowledge that the thirty-one-page brief was, in fact, thirty-one pages, plaintiff's counsel accused defense counsel of a "hyper-technical and crabbed interpretation" of N.D. Local Rule 7.1.¹⁷³ Judge Rodovich succinctly dismissed this charge, writing,

How could the brief be in compliance with Local Rule 7.1? Even a first grader can count the number of pages and determine that the brief is in excess of the 25 page limit. Misnumbering pages is an inexcusable act of deception. Denying that the brief is in excess of the page limitation multiplies the problem tenfold.¹⁷⁴

Judge Rodovich nonetheless allowed plaintiff's counsel belated leave to file the oversized brief, but held that the "conduct of [plaintiff's counsel] cannot go unpunished."¹⁷⁵ Finding counsel's arguments frivolous, the court ordered

166. *Id.* at 3.

167. *Id.*

168. *Id.*

169. *Id.* at 6-7.

170. *Id.* at 2.

171. *Id.* at 3-4.

172. *Id.* at 4.

173. *Id.*

174. *Id.* at 4-5.

175. *Id.* at 5.

plaintiff's counsel to show cause why sanctions should not be imposed under Federal Rule of Civil Procedure 11.¹⁷⁶

B. More Sanctions

In *Shrock v. United States*,¹⁷⁷ Judge Lee assessed a \$2500 sanction against a pro se litigant for filing a third frivolous claim. Judge Lee further ordered the Clerk to reject any future filings tendered by the litigant until the \$2500 was paid.¹⁷⁸

XIII. ATTORNEYS' FEES: SECTION 1988 FEE AWARD

In *Meyer v. Robinson*,¹⁷⁹ Magistrate Judge Foster issued a lengthy opinion determining fees under 42 U.S.C. § 1988¹⁸⁰ for prevailing plaintiff's counsel in a civil-rights action. The opinion contains a good summary of leading principles in this area. In awarding fees to plaintiff's counsel, Judge Foster made the following key rulings:

There is a strong presumption that the "lodestar" (the number of hours reasonably expended multiplied by a reasonable hourly rate) is the reasonable fee under section 1988 and other fee-shifting statutes.¹⁸¹

Market rates are presumed to be the reasonable hourly rate for an attorney's services, and the law presumes that the market rate for a prevailing party's legal services is the rate the attorney actually charged.¹⁸²

The relevant rate, however, is not what the plaintiff was charged, but the opportunity cost to plaintiff's attorney—that is, the rate the attorney could have earned if the services were sold to someone else.¹⁸³

1) Prevailing market rates are used only if it is impossible or impracticable for counsel to show actual rates charged to other clients (e.g., because all work is on a contingency fee basis).¹⁸⁴

2) The hourly rate cannot be enhanced to account for contingency

176. *Id.* at 6-7.

177. No.1:95-cv-205, 1995 WL 810029 (N.D. Ind. Nov. 14, 1995) (order granting motion to dismiss), *aff'd*, 92 F.3d 1187 (7th Cir.) (unpublished table decision), *cert. denied*, 117 S. Ct. 485 (1996).

178. *Id.* at *1 (citing *Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995)).

179. No. IP 90-1351-C, 1995 WL 265035 (S.D. Ind. Mar. 20, 1995).

180. (1994).

181. *Meyer*, 1995 WL 265035, at *1.

182. *Id.* at *2.

183. *Id.*

184. *Id.* at *1-2.

fees.¹⁸⁵

- 3) Courts must employ the rate an attorney charges and receives from paying, noncontingent clients.¹⁸⁶
- 4) Prejudgment interest should be awarded presumptively on attorneys' fees to make counsel whole, but courts ordinarily should not apply current hourly rates to earlier work.¹⁸⁷
- 5) Prejudgment interest on fees should be calculated using the prime interest rate with compound interest.¹⁸⁸
- 6) Judge Foster held that one of plaintiff's attorneys failed to support his claimed \$245 hourly rate, and instead assigned an hourly rate of \$175 for the first three years of the case and \$200 for the second three years.¹⁸⁹
- 7) For another, more junior attorney, Judge Foster assigned rates of \$70 for the first three years of litigation and \$120 for the last three years.¹⁹⁰
- 8) For law clerks, Judge Foster assigned an hourly rate of \$50.¹⁹¹

XIV. POST-JUDGMENT: RULE 60(B)

In *Helm v. Resolution Trust Corp.*,¹⁹² the Seventh Circuit reaffirmed that attorney neglect does not justify opening a judgment under Federal Rule of Civil Procedure 60(b). As the court explained, "This is a simple case of attorney negligence, and as we have held more than once, inexcusable attorney negligence is not an exceptional circumstance justifying relief under Rule 60(b)(6)."¹⁹³

XV. APPEALS

A. Appellate Jurisdiction

In *Central States, Southeast & Southwest Pension Fund, v. Central Cartage*

185. *Id.* at *2.

186. *Id.*

187. *Id.* at *4.

188. *Id.* at *6.

189. *Id.* at *10-11.

190. *Id.* at *11.

191. *Id.* at *14.

192. 84 F.3d 874 (7th Cir. 1996).

193. *Id.* at 879.

Co.,¹⁹⁴ the Seventh Circuit held that an interlocutory order denying a motion to compel arbitration was not immediately appealable as an order denying an injunction under 28 U.S.C. § 1291. Although the Arbitration Act,¹⁹⁵ does allow for appeal from an order denying arbitration, this provision does not apply to transportation cases.¹⁹⁶ Thus, the Seventh Circuit held that the Act did not provide for immediate appeal in this case.¹⁹⁷

B. New Seventh Circuit Handbook

The Seventh Circuit has updated and republished its invaluable guide to Seventh Circuit appellate practice. The *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* is available from the Seventh Circuit Clerk at no charge. Call the clerk at (312) 435-5850 for more information. The Handbook is a must for anyone venturing into the Seventh Circuit.

C. Circuit Rule 30

Pursuant to Federal Rule of Appellate Procedure 30(a)(3), the appellant must provide the "judgment, order or decision in question."¹⁹⁸ The Seventh Circuit expounded on this by passing Circuit Rule 30 years ago. Circuit Rule 30 requires appellants to include certain materials with the opening brief, including any order at issue.¹⁹⁹ Circuit Rule 30(c) requires appellant's counsel to certify, as part of the opening brief, that Circuit Rule 30(a) and (b) have been satisfied.²⁰⁰

Unfortunately Circuit Rule 30(c) is commonly violated. A recent decision from Chief Judge Posner, Judge Easterbrook, and Judge Flaum deals exclusively with this problem, and warns the bar that future violations will result in sanctions.²⁰¹

In *Galvan*, the court observed that the appellants in four of the six oral arguments set for July 10 had violated Circuit Rule 30(c).²⁰² The panel chastised counsel at oral argument, with Judge Easterbrook bluntly stating to one attorney that his certificate was false and constituted a direct misrepresentation to a court.²⁰³

In the court's recent opinion in *Galvan*, the court publicly admonished the

194. 84 F.3d 988 (7th Cir.), *cert. denied*, 117 S. Ct. 276 (1996).

195. 9 U.S.C. § 16(a) (1994).

196. *Central States*, 84 F.3d at 993.

197. *Id.*

198. FED. R. APP. P. 30(a)(3).

199. 7TH CIR. R. 30.

200. 7TH CIR. R. 30(c).

201. *In re Galvan*, 92 F.3d 582 (7th Cir. 1996).

202. *Id.* at 584.

203. *Id.* at 584-85 (The undersigned was present that day for argument in another case and witnessed first-hand the court's frustration with those who had violated Rule 30(c). Suffice it to say that it was not a pleasant day for some in Chicago).

four counsel in its published opinion.²⁰⁴ The court went on to hold that, in the future, even in criminal cases, fines would be assessed for noncompliance with Rule 30(c).²⁰⁵ The court is obviously very serious about this issue; indeed it called Rule 30 “the most important rule this court has issued.”²⁰⁶ Appellate counsel are well advised to read Circuit Rule 30, as well as all other Circuit Rules and Federal Rules of Appellate Procedure, well in advance of commencing work on a Seventh Circuit brief.

204. *Id.*

205. *Id.*

206. *Id.* at 584.

SURVEY OF DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

JOHN R. MALEY*

Indiana practitioners face an ongoing challenge staying current on civil procedure developments. This Article highlights major procedural changes during the survey period to assist in that regard.

I. PERSONAL JURISDICTION

In addressing personal jurisdiction issues, Indiana practitioners benefit from a well written long-arm statute found at Trial Rule 4.4(A). This rule was amended effective March 1, 1997, to add a new basis for asserting personal jurisdiction for “abusing, harassing, or disturbing the peace of, or violating a protective or restraining order for the protection of, any person within the state by an act or omission done in this state, or outside this state if the act or omission is part of a continuing course of conduct having an effect in this state.”¹ This amendment is a welcome addition to the long-arm statute, and addresses a situation that arises most often in domestic violence cases.

II. PREFERRED VENUE

Indiana’s preferred venue system under Trial Rule 75(A) is well-written and fairly straightforward, but nonetheless occasionally requires judicial interpretation for close cases. Such a situation arose in *Meridian Mutual Insurance Co. v. Harter*.² In *Harter*, plaintiffs were in an auto accident in Randolph County. They sued the other driver and obtained a judgment of \$75,000, but the driver was only insured for \$25,000. Plaintiffs then sued their insurer, Meridian Mutual, in Randolph County seeking the \$50,000 of underinsurance.

Meridian Mutual moved to transfer the action to Marion County, asserting under Trial Rule 75(A)(4) that preferred venue lay in its county of its principal office (Marion County).³ The trial court denied the transfer motion, agreeing with plaintiffs that the claim “related to” an accident occurring in Randolph County pursuant to Trial Rule 75(A)(3).⁴ The Indiana Court of Appeals reversed, ruling that the claim arose under the insurance policy and that preferred venue was

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1. IND. TR. R. 4.4(A)(8).

2. 671 N.E.2d 861 (Ind. 1996).

3. Trial Rule 75(A)(4) provides for preferred venue in “the county where either the principal office of a defendant organization is located or the office or agency of a defendant organization or individual to which the claim relates or out of which the claim arose is located, if one or more such organizations or individuals are included as defendants in the complaint.”

4. Trial Rule 75(A)(3) allows for preferred venue in “the county where the accident or collision occurred, if the complaint includes a claim for injuries relating to the operation of a motor vehicle or a vehicle on railroad, street, or interurban tracks.”

proper only in Marion County.⁵

The Indiana Supreme Court granted transfer, vacated the court of appeals' decision, and held that preferred venue lay in Randolph County and Marion County. Writing for a unanimous court, Justice Boehm explained that there may be more than one county of preferred venue under Trial Rule 75(A).⁶ Thus, Justice Boehm observed that the court of appeals correctly concluded that Marion County was a county of preferred venue under Trial Rule 75(A)(4) because Meridian Mutual had its principal office in Marion County.

However, transfer is available under Trial Rule 75(B) only if the court in which the action is commenced is not a court of preferred venue. Because Randolph County was a county of preferred venue under Trial Rule 75(A)(3) transfer out of Randolph County to Marion County was not authorized.⁷

In finding venue appropriate in the county where the accident occurred, the court reasoned that Trial Rule 75(A)(3)—which allows venue in “the county where the accident . . . occurred, if the complaint includes a claim for injuries relating to the operation of a motor vehicle”—does not require that the claim arise from the accident. The court wrote:

All it demands is that the claim be (1) for injuries and (2) relate to the operation of a vehicle. Although less clear as a matter of the syntax of the rule, the term “the accident or collision” obviously refers to the nature of the claim and serves to impose a third requirement that the claim “relate to” and accident or collision occurring in the county. Plaintiffs' claim meets these tests. It is plainly a claim for injuries, and it relates to an accident or collision occurring in Randolph County involving the operation of a motor vehicle.⁸

The court further noted that its holding comports with “the underlying philosophy of preferred venue.”⁹ Justice Boehm explained:

It is clear that the rule contemplates that people who operate vehicles in various parts of this state can expect to litigate any resulting accidents or collisions in those locales. Their insurers can expect to find themselves in litigation wherever their insured's vehicles take them. There is nothing unreasonable in permitting any resulting underinsured motorist issues to go forward where the accident occurred, which is presumably where the testimony of witnesses, obtaining of police reports, and jury views are most easily arranged. A contrary rule produces a lawsuit over an accident

5. 663 N.E.2d 224 (Ind. Ct. App.), *vacated*, 671 N.E.2d 861 (Ind. 1996).

6. 671 N.E.2d at 862 (citing 4 WILLIAM F. HARVEY, INDIANA PRACTICE § 75.2, at 552 (2d ed. 1991); *Jasper County Bd. of County Comm'rs v. Monfort*, 663 N.E.2d 1166, 1167 (Ind. Ct. App. 1996), *trans. denied*; *Storey Oil Co. v. American States Ins.*, 622 N.E.2d 232, 235 (Ind. Ct. App. 1993)).

7. *Id.*

8. *Id.* at 863.

9. *Id.*

in a remote county based solely on the location of the insurer's home office, notwithstanding that the insurer has frequently, as in this case, elected to do business with insureds throughout the state and routinely defends its insureds in many counties.¹⁰

Although the insurance defense bar probably does not like the ruling, the *Harter* decision does provide certainty on the venue of underinsurance actions arising from car accidents. And, the decision shows that the Indiana Supreme Court is willing to entertain transfer petitions on narrow procedural issues.

III. CHANGE OF JUDGE RULINGS/APPEALABILITY

In *Trojnar v. Trojnar*,¹¹ the court of appeals addressed whether a ruling on a change of judge under Trial Rule 76 is immediately appealable. In a split opinion, a majority of the court said yes; Judge Staton dissented, concluding that an appeal from a change of judge ruling must be certified under Appellate Rule 4(B)(6). There is substantial logic behind the dissent's view, because Appellate Rule 4(B)(5) specifically allows interlocutory appeals of transfers under Trial Rule 75, but does not mention change of venue or change of judge rulings under Trial Rule 76. The majority is correct that judicial economy favors immediate appeal of a change of judge ruling, but the appellate rules do not expressly provide for such an immediate appeal without a certification under Appellate Rule 4(B)(6). Until the debate is resolved by the Indiana Supreme Court, practitioners who are dissatisfied with a change of judge ruling should follow *Trojnar*, which squarely holds: "At the time of an adverse ruling under T.R. 76, the parties must perfect an appeal."¹²

IV. AMENDMENTS/RELATION-BACK

Trial Rule 15(C) allows amended pleadings that name new parties to relate back to the original pleading—and thus satisfy the statute of limitations if the amendment post-dates the limitations period—if three tests are satisfied: (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading; (2) the new party brought into the action received such notice of the action, within the limitations period, that the new party will not be prejudiced in defending the action; and (3) the new party knew or should have known, within the limitations period, that but for mistaken identity the action would have been brought against them.¹³ A straightforward application of this rule is found in *Fifer v. Soretore-Dodds*.¹⁴

In *Fifer*, plaintiff was injured in a car accident. The other car was driven by and registered in the name of Stephanie Soretore-Dodds, but was insured by

10. *Id.*

11. 676 N.E.2d 1094 (Ind. Ct. App. 1997).

12. *Id.* at 1096.

13. IND. TR. R. 15(C).

14. 680 N.E.2d 889 (Ind. Ct. App. 1997).

Cecilia Soretore (the driver's mother). Three days before the statute of limitations was to expire, plaintiff sued the mother, who received service of the complaint five days after the limitations period. The mother promptly notified her daughter of the lawsuit. After discovery, plaintiff sought and was granted leave to amend to name the daughter as the proper party defendant. The daughter thereafter moved for summary judgment on the basis that the amended complaint did not relate back. The trial court agreed and dismissed the action.

The Indiana Court of Appeals affirmed, rejecting plaintiff's argument that the daughter had the same notice of the lawsuit as the mother (both five days after the limitations period). Plaintiff asserted that it would be illogical to disallow suit against the daughter where the suit was timely against the mother. The court of appeals, however, followed the plain language of Trial Rule 15(C). The new party—here the daughter—could be brought in under Trial Rule 15(C) only if *within the limitations period* she had notice of the action. She did not, so the claim against her was untimely.¹⁵

The *Fifer* decision is a painful reminder that there is great risk in filing actions shortly before the limitations period expires. When there is no choice but to file an action at such a late date, great care must be taken to properly name the parties: Trial Rule 15(C) is not a license to bring in new parties after the fact.

V. DISCOVERY: WORK-PRODUCT

The decision in *National Engineering & Contracting Co. v. C&P Engineering & Manufacturing Co.*,¹⁶ presents a classic battle over work-product protection. The case arose from a contractor's construction work on a highway in Connersville. Two days after beginning work, the contractor noticed new cracks in an adjacent building. That day the contractor's field personnel took fourteen pictures of the site upon the "standing advice" of general counsel. Four days later the contractor's field personnel notified their corporate director of safety and loss control, who the next day met with the building owner. At the meeting, the building owner's attorney was also present, and he discussed his theory of liability against the contractor. That same day, at the advice of general counsel the contractor's director of safety and loss control took twenty-six more photos. Two days later, he took twenty additional pictures. Thereafter, when the building had been repaired the contractor's national construction superintendent took eleven more photos.¹⁷

Nearly two years later the tenant of the damaged building sued the contractor. In discovery, the tenant requested all photographs of the building. The contractor objected to producing the seventy-one photos asserting the work-product doctrine. The trial court ordered the contractor to produce all of the photos, and an

15. *Id.* at 891. Although not specifically mentioned by the court, a key point in this context is that *filing* of an action tolls the statute of limitations.

16. 676 N.E.2d 372 (Ind. Ct. App. 1997).

17. *Id.* at 375.

interlocutory appeal ensued.¹⁸

The court of appeals, which affirmed in part and reversed in part, began by noting the deferential standard of review:

The discovery rules are designed to allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement. Due to the fact-sensitive nature of discovery matters, the ruling of the trial court is cloaked in a strong presumption of correctness on appeal. Our standard of review in discovery matters is limited to determining whether the trial court abused its discretion. This court will reverse only where the trial court has reached an erroneous conclusion which is clearly against the logic and effect of the facts of the case. There will be no reversal of a trial court discovery order without a showing of prejudice.¹⁹

With this background, the court of appeals then reviewed the applicable standards for the work-product doctrine. The court noted that Trial Rule 26(B)(3) defines the work-product doctrine to limit discovery of documents and tangible things that are prepared in anticipation of litigation or trial by or for another party or by or for that party's representative. If the doctrine applies, such materials may only be obtained by showing that the party seeking discovery has a substantial need for the materials, and is unable without undue hardship to obtain the substantial equivalent by other means.²⁰

The court further explained that a document or tangible thing is gathered "in anticipation of litigation" if the "document or tangible thing can fairly be said to have been prepared or obtained because of the prospect of litigation and not, even though litigation may already be a prospect, because it was generated as part of the company's regular operating procedure."²¹ The court continued:

There is no clear-cut rule to determine whether the product of an investigation is discoverable; the determination whether the product is discoverable depends upon the facts of each case. The test has been articulated as "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." * * * In order for the material to constitute work product, the probability of litigating the claim must be substantial and imminent.²²

With this legal framework at hand, the court then analyzed each set of

18. *Id.*

19. *Id.* (citations omitted).

20. *Id.* at 376.

21. *Id.* at 377.

22. *Id.* (citations omitted). The court of appeals also rejected the plaintiff's argument that a blanket rule should be invoked deeming discoverable all photos depicting an event or scene immediately at or adjacent to the relevant time because the "determination of whether materials constitute work product necessitates a factual, case-by-case analysis." *Id.* at 376.

photographs. As for the pictures taken by field personnel at the time cracks were discovered, the court held that the probability of litigation at that time was neither substantial nor imminent such that the work-product doctrine did not apply. The contractor advised its employees to photograph damage as a matter of general company policy, and there was no showing that the building owner or tenant even knew of the damage at the time.²³

As for the photos taken at or about the meeting with the building owner's counsel, the court of appeals ruled that the record did not show when the photos were taken (e.g., before or after the meeting). Accordingly, the court ruled that the contractor failed to meet its burden of proof, so the second photos were discoverable.²⁴

As for the third and fourth sets of photos, even the plaintiff acknowledged that these were taken by the contractor after the discussions with the building owner's counsel. The court of appeals thus held that it is "apparent from the record that, after the meeting, the probability of litigation was substantial and imminent and that the final thirty-one photographs were taken in anticipation of litigation."²⁵ However, the plaintiff asserted a special need for the materials and undue hardship in obtaining the equivalent. The court of appeals rejected this argument, though, reasoning that these photos depicted the building after being repaired and thus in its current state. Accordingly, plaintiff could obtain the substantial equivalent with little difficulty, so the last sets of photos were not discoverable.²⁶

The *National Engineering* decision is a must read for all civil litigators in Indiana. The opinion thoroughly reviews all major standards for work-product issues in Indiana, and then methodically and correctly applies those standards to a varying fact pattern.

VI. DISCOVERY SANCTIONS

In *Bankmark of Florida v. Star Financial Card Services*,²⁷ the Indiana Court of Appeals held that under Trial Rule 37(B), a trial court has the authority to assume personal jurisdiction over a defendant who fails to comply with discovery orders. The appeal arose from the trial court's denial of an out-of-state defendant's motion to dismiss for lack of personal jurisdiction. In the course of discovery on the jurisdictional issue, the defendant failed to comply with discovery orders. Relying on Trial Rule 37(B)(2)(b), the trial court denied the defendant's motion to dismiss on a sanction, and the court of appeals affirmed. Writing for the court, Judge Baker reasoned that both the text of the rule and federal authority²⁸

23. *Id.* at 378 & n.5.

24. *Id.* at 378.

25. *Id.* at 379.

26. *Id.*

27. 679 N.E.2d 973 (Ind. Ct. App. 1997).

28. *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982) (district courts have authority under Federal Rule of Civil Procedure 37(b)(2)(A) to presume personal jurisdiction over a party who fails to comply with a discovery order).

support the conclusion that violation of a discovery order can estop a defendant from asserting that personal jurisdiction is lacking.²⁹

In another case involving discovery sanctions,³⁰ the plaintiff failed to appear for two properly noticed depositions. Defendant moved to dismiss as a result, and the court notified plaintiff that he had 14 days to respond to the motion. Plaintiff failed to respond, and the trial court dismissed the action with prejudice as a sanction under Trial Rule 37.³¹

On appeal, plaintiff contended that the trial court was required to hold a hearing prior to dismissal. The court of appeals disagreed, reasoning that while hearings are required default judgments as a sanction, dismissals under Trial Rule 37 do not require a hearing. Further, the court of appeals noted that plaintiff was given an opportunity to respond to the motion to dismiss but failed to do so.³² The court of appeals also ruled that the trial court did not abuse its discretion in selecting dismissal as the sanction given plaintiff's failure to appear for two properly noticed depositions.³³ The decision shows that Indiana appellate courts are not tolerant of discovery abuses, and review sanctions orders deferentially, as they should.

VII. SUMMARY JUDGMENT

The decision in *Templeton v. City of Hammond*,³⁴ teaches that parties who fail to respond to summary judgment motions will have the movant's designated facts taken as true. However, that does not mean the movant is entitled to summary judgment. As the *Templeton* court explained in reversing in part a grant of summary judgment:

[T]he amendments to Trial Rule 56 creating the requirement that material issues of fact and supporting evidence in opposition to summary judgment be designated did not alter the structural burden of summary judgment. The party moving for summary judgment still bears the burden of showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. If the movant fails to make this prima facie showing, then entry of summary judgment in favor of the movant is precluded, regardless of whether the non-movant did or did not designate facts and evidence in response to the motion for summary judgment.³⁵

Non-movants should always respond to summary judgment motions, but when they fail to movants are only entitled to summary judgment if the designated facts

29. *Bankmark*, 679 N.E.2d at 977.

30. *Hatfield v. Edward J. DeBartolo, Corp.*, 676 N.E.2d 395 (Ind. Ct. App. 1997).

31. *Id.* at 397.

32. *Id.* at 400.

33. *Id.*

34. 679 N.E.2d 1368 (Ind. Ct. App. 1997).

35. *Id.* at 1371 (citations omitted).

(now taken as true) require judgment for the movant under governing substantive law.

In an unrelated case, the court of appeals held that a party who fails to raise evidentiary issues regarding summary judgment affidavits waives such arguments on appeal.³⁶ This is part of a trend in Indiana summary judgment practice in which the appellate courts have made clear that the battleground in summary judgment is principally at the trial court level.

VIII. CLASS ACTIONS

In *Hefty v. All Other Members of the Certified Settlement Class*,³⁷ the Indiana Supreme Court addressed complex issues under Trial Rule 23 governing class action settlements. In so doing, the court looked to federal cases interpreting Rule for guidance, citing more than 30 different federal opinions. Writing for the court, Justice Sullivan explained the reliance on federal decisions, writing, "Trial Rule 23 is based upon Fed. R. Civ. P. 23 and it is appropriate for courts to look at federal court interpretations of the federal rule when applying the Indiana rule."³⁸ Beyond the class-action lessons of *Hefty*, the decision serves as an important example of how Indiana practitioners can seek guidance from federal decisions on procedural issues.

The *Hefty* decision otherwise serves as the guidebook for settlements in class actions. The court announced a number of key principles, including:

- The mandate of Trial Rule 23(E) requires courts to certify classes more cautiously in settlements than in litigated class actions;³⁹
- Trial courts must resolve whether to certify the class under the standards of Trial Rule 23(A) and (B) before determining the fairness of and approving class settlements;⁴⁰
- Trial courts must require a showing of fairness before approving class settlements;⁴¹
- Trial courts may not give rubber stamp approval of proposed class settlements: the settlement must be "fair, reasonable, and adequate,"⁴²
- To protect the interests of absentee class members, the trial court

36. *Bankmark of Fla., Inc. v. Star Fin. Card Servs., Inc.*, 679 N.E.2d 973, 980 (Ind. Ct. App. 1997).

37. 680 N.E.2d 843 (Ind. 1997).

38. *Id.* at 848 (citing *In re Tina T.*, 579 N.E.2d 48, 55 (Ind. 1991)).

39. *See id.* at 849-50.

40. *See id.* at 850.

41. *See id.* at 851.

42. *Id.* at 849.

must “independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished;”⁴³

- The trial court should follow a two-step process in assessing fairness of settlement: (1) a preliminary evaluation of the fairness of the settlement; and (2) a formal fairness hearing where arguments for and against settlement are heard.⁴⁴
- Indiana courts should employ six factors as a useful guide in structuring their opinions on fairness of class settlements: (1) the strength of the plaintiffs’ case measured against the terms of the settlement; (2) the complexity, length, and expense of continued litigation; (3) the degree of opposition to the settlement; (4) the benefit of the settlement to class representatives and their counsel compared to the benefit of settlement to the class members; (5) the opinion of competent counsel as to the reasonableness of the settlement; and (6) the stage of the proceedings and the amount of discovery completed.⁴⁵

Applying the six factors noted above, the Indiana Supreme Court determined that the trial court abused its discretion in approving the class settlement in *Hefty*.⁴⁶ The court noted that its analysis was not meant to constitute de novo review, but that it does “impose upon a trial court a high level of scrutiny when determining the fairness, reasonableness, and adequacy of a class action settlement.”⁴⁷ The court added, “Where a trial court fails to make any findings of fact in this regard, an appellate court cannot determine whether the trial court has abused its discretion”⁴⁸

The *Hefty* decision is a must read for any Indiana practitioner prosecuting or defending a class action, as well as for any trial judge handling such a case. The court’s comprehensive, well-written opinion provides many answers to important class-action questions.

IX. PROCEEDINGS SUPPLEMENTAL

In *Borgman v. Aikens*,⁴⁹ a creditor obtained a judgment against a debtor in federal court. More than ten years later the judgment creditor initiated proceedings supplemental in an Indiana state court without first domesticating the

43. *Id.* at 851.

44. *See id.*

45. *See id.*

46. *Id.* at 857.

47. *Id.*

48. *Id.*

49. No. 69A01-9611-CV-376, 1997 WL 269198 (Ind. Ct. App. May 22, 1997).

federal judgment.⁵⁰ The debtor moved to dismiss, and interlocutory appeal was taken.

The court of appeals reversed, holding that proceedings supplemental, which are governed by Trial Rule 69(E), are a continuation of the original action. As such, they are not subject to the ten-year limitations period on an action on a judgment. However, an Indiana court may only enforce a federal judgment or a judgment from another Indiana county through proceedings supplemental if the judgment is domesticated first. Further, any action to domesticate a judgment must be commenced within ten years from the date of judgment⁵¹ These are important holdings for any practitioner engaged in collection of judgments.

50. Domesticating a judgment is the process of filing an action in a local trial court on a judgment obtained from another state or federal court to obtain a local judgment. *Id.* at *1 n.1.

51. *Id.* at *4.

HEALTH CARE LAW: A SURVEY OF 1996 DEVELOPMENTS

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INTRODUCTION

This Survey of developments for the 1996 Survey period covers the various aspects of the rapidly expanding and changing area of health care law. This Survey focuses on specific areas of health law that are likely to have the broadest impact on practitioners in the health care area. The Survey is not intended to be a comprehensive or complete discussion of all changes in this field; rather, it is intended to be a summary of important activities in the areas of provider liability, Medicare and Medicaid reimbursement, physician-assisted suicide, patient rights, tax exemptions, antitrust, and employment.

I. HEALTH CARE PROVIDER LIABILITY

During the Survey period, the Indiana judiciary decided several significant cases relating to liability of health care providers. The issues addressed in the cases varied widely, ranging from the status of a physician with respect to hospitals and non-patient third parties to proper service of process upon health care providers following the rendition of an opinion by a medical review panel formed pursuant to the Indiana Medical Malpractice Act.¹

A. Judicial Decisions

1. *Apparent Agency Between Hospital and Non-Employed Physicians.*—In *Sword v. NKC Hospitals, Inc.*,² the Indiana Court of Appeals addressed whether a hospital could be held vicariously liable for the alleged negligence of a non-employed physician on its medical staff. While in labor with her first child at Norton Hospital in Louisville, Kentucky, Ms. Sword received an epidural anesthetic from Dr. Luna.³

Following delivery of a healthy child, Ms. Sword experienced headaches, sensitivity to light and loud noises, and numbness in her back. The Swords brought suit against Norton Hospital for the alleged negligence of Dr. Luna in administering the epidural.⁴ After the trial court held that hospitals are not liable

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1. IND. CODE §§ 27-12-1-1 to -18-2 (1993 & Supp. 1996). The term, “Act,” or, “Malpractice Act,” as used throughout this section of the Survey refers to the Indiana Medical Malpractice Act.

2. 661 N.E.2d 10 (Ind. Ct. App. 1996), *trans. granted*, (Ind. Oct. 7, 1996).

3. *Id.* at 11. It was undisputed that Dr. Luna was not an employee of Norton Hospital but was, rather, an independent contractor on the hospital’s medical staff.

4. *Id.* Norton Hospital, a Kentucky hospital, apparently was not a qualified health care

for the negligence of independent contracting physicians on the medical staff,⁵ the Swords appealed.

The Swords urged the court of appeals to adopt either the theory of ostensible agency⁶ or the theory of agency by estoppel⁷ to render the hospital liable for Dr. Luna's acts. The court, however, declined to adopt either of the restatement theories and held that the Swords could state a claim against Norton Hospital under the existing Indiana law of apparent agency.⁸ Thus, according to the court of appeals:

[H]ospitals may be held liable for the negligence of their apparent agents, notwithstanding the fact that the agents are independent contractors. For a hospital to be held liable for the negligence of a health care professional under the doctrine of apparent agency, a plaintiff must show that the hospital acted or communicated directly or indirectly to a patient in such a manner that would lead a reasonable person to conclude that the health care professional who was alleged to be negligent was an employee or agent of the hospital, and that the plaintiff justifiably acted in reliance upon the conduct of the hospital, consistent with ordinary care and prudence. A hospital is not liable for the plaintiff's injuries if the plaintiff knew, or should have known, that the allegedly negligent health care professional is an independent contractor.⁹

The court of appeals traced the origin of the rule that a hospital could not be

provider under the Indiana Medical Malpractice Act. *See* IND. CODE § 27-12-3-2 (1993). Thus, the case apparently was not subject to the procedural requirements of the Act and was brought directly in court. IND. CODE §§ 27-12-10-1 to -26 (1993). *See infra* notes 36-38 and accompanying text.

5. *Sword*, 661 N.E.2d at 12 (citing *Interman v. Baker*, 15 N.E.2d 365 (Ind. 1938); *South Bend Osteopathic Hosp., Inc. v. Phillips*, 411 N.E.2d 387 (Ind. Ct. App. 1980); *Ross v. Schubert*, 388 N.E.2d 623 (Ind. App. 1979); *Hoover v. Protestant Deaconess Hosp.*, 133 N.E.2d 864 (Ind. App. 1956); *Fowler v. Norways Sanitorium*, 42 N.E.2d 415 (Ind. App. 1942).

6.

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

RESTATEMENT (SECOND) OF TORTS § 429 (1965).

7.

One who represents that another is a servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

8. *Sword*, 661 N.E.2d at 12.

9. *Id.* at 15 (footnote omitted).

held liable for the negligence of non-employed physicians to *Interman v. Baker*.¹⁰ According to the court, *Interman* “concluded that because hospitals could not practice medicine under Indiana law, no patient could reasonably conclude that those who were practicing medicine in hospitals were the hospitals’ employees.”¹¹ In formulating the new rule, the court noted that judicial decisions and statutory changes subsequent to *Interman* had essentially eroded the foundation upon which the decision rested. Specifically, the court noted in *Sloan v. Metro Health Council*,¹² that the *Interman* rule had eroded over time, thus making the rule no longer viable.¹³ In addition, the court observed that, under the Indiana Professional Corporations Statute,¹⁴ corporate entities such as hospitals could be held liable for the negligent acts of employees.¹⁵ “Thus, the rationale of *Interman*—that patients could not reasonably conclude that doctors are agents or servants of the hospitals in which they practice because hospitals cannot practice medicine—is now without foundation in law or policy.”¹⁶

In *Sword*, the court of appeals noted that the Swords must establish that they justifiably acted in reliance upon some representation, direct or indirect, of Norton Hospital that an agency relationship existed between the hospital and Dr. Luna.¹⁷ The Swords presented evidence of various advertisements made by the hospital regarding its expertise in caring for maternity patients, the most relevant of which provided that the hospital offered:

[I]nstant access to the specialized equipment and facilities, as well as to physician specialists in every area of pediatric medicine and surgery. Every maternity patient has a private room *and the full availability of a special anesthesiology team, experienced and dedicated exclusively to OB patients*.¹⁸

The court of appeals determined that genuine issues of material fact existed. The court of appeals, therefore, reversed and remanded the decision with orders to consider all circumstances and evidence presented.¹⁹

Nonetheless, Judge Rucker, in his dissenting opinion, argued that in the absence of the right to control which typically attends an employer-employee relationship, it was inappropriate to make the hospital vicariously liable for the acts of an independent contracting physician on the medical staff.²⁰ Although he acknowledged that a hospital may be responsible for the acts of a physician

10. 15 N.E.2d 365 (Ind. 1938).

11. *Sword*, 661 N.E.2d at 14.

12. 516 N.E.2d 1104 (Ind. Ct. App. 1987).

13. *Sword*, 661 N.E.2d at 14.

14. IND. CODE §§ 23-1.5-1-1 to -5-2 (1993).

15. *Sword*, 661 N.E.2d at 14.

16. *Id.*

17. *Id.* at 15.

18. *Id.* (emphasis in original).

19. *Id.* at 16.

20. *Id.* at 17 (Rucker, J., dissenting).

rendering medical care on hospital premises, Judge Rucker stated, "that is so only where the physician is an employee of the hospital and the hospital is aware that the care the physician is providing has deviated from normal practice."²¹ Because there was no dispute that Dr. Luna was not an employee of the hospital, Judge Rucker concluded that, under the law of Indiana, Dr. Luna's negligence as an independent contractor could not be imputed to the hospital.²²

The Indiana Supreme Court granted the hospital's petition for transfer on October 7, 1996, and heard oral arguments on the issues on November 26, 1996. Thus, the bench and bar must await the final disposition of this important case.

2. *The Scope and Extent of the Health Care Provider's Duty.*—The Indiana Court of Appeals decided two cases²³ during the Survey period relating to a health care provider's status with respect to certain classes of individuals who alleged liability on the part of the providers for claimed injuries.

The second case decided during the Survey period which related to the duty of a health care provider was *Dixon v. Siwy*.²⁴ In 1987, Debra Dixon, received breast implants with which she subsequently developed complications.²⁵ Dixon was examined and ultimately underwent a surgical procedure described as a "left breast closed-capsular rupture" at Wishard Memorial Hospital.²⁶ Dr. Janet Turkle, a resident in Wishard's plastic surgery program, was the physician who examined Dixon and performed the surgical procedure.²⁷

Following her examination by Dr. Turkle, but before the performance of the surgical procedure, Dixon signed a "Consent and Pre-Operative Note" in which she consented to the operation "by Siwy, M.D., or members of the medical staff and personnel of Wishard Memorial Hospital."²⁸ Dr. Siwy was a member of the faculty at Wishard Hospital in the plastic surgery program; however, she did not consult on the case or participate in the recommendation or performance of the surgical procedure.²⁹ Dr. Siwy's name appeared on the consent form as a result of the "common practice at Wishard for residents, who were already certified in

21. *Id.* at 18 (Rucker, J., dissenting) (citing *Weaver v. Robinson*, 627 N.E.2d 442 (Ind. Ct. App. 1993), *disapproved on other grounds*, *Kennedy v. Murphy*, 659 N.E.2d 506 (Ind. 1995)).

22. *Id.* (Rucker, J., dissenting).

23. One of which, *Cram v. Howell*, 662 N.E.2d 678 (Ind. Ct. App. 1996), *vacated and rev'd*, 680 N.E.2d 1096 (Ind. 1997), was subsequently overturned by the Indiana Supreme Court.

24. 661 N.E.2d 600 (Ind. Ct. App. 1996).

25. *Id.* at 602.

26. *Id.*

27. *Id.*

28. *Id.* The Consent and Pre-Operative Note provided in part as follows:

I (we) hereby request and consent to the performance of the following operation or procedure on the patient by Siwy, M.D., or members of the medical staff and personnel of Wishard Memorial Hospital . . . [left breast closed-capsular rupture] . . . I acknowledge that I have had an opportunity to discuss with Turkle, M.D., the operation or procedure . . . and risks and possible complications . . .

Id.

29. *Id.*

general surgery, to simply fill in the name of a doctor on the faculty in that space, whether or not that particular doctor had in fact been consulted.”³⁰

Dixon filed a proposed medical malpractice complaint with the Indiana Department of Insurance pursuant to the Indiana Medical Malpractice Act³¹ naming Dr. Turkle, Dr. Siwy and Wishard Hospital as defendants and alleged that they had committed medical negligence.³² Upon Dr. Siwy’s filing of a motion for preliminary determination of law³³ in the trial court, the trial court granted the motion and dismissed the proposed complaint as to her.³⁴

On appeal, Dixon argued initially that the trial court lacked jurisdiction to entertain Dr. Siwy’s motion to dismiss.³⁵ The court of appeals acknowledged that in medical malpractice cases the jurisdiction³⁶ of the trial court is limited; they have no jurisdiction “to rule preliminarily upon any . . . issue of law or fact preserved for a written opinion by the medical review panel.”³⁷ The court further observed, however, that “the trial court does have jurisdiction, before the medical

30. *Id.*

31. IND. CODE §§ 27-12-1-1 to -18-2 (1993 & Supp. 1996).

32. *Dixon*, 661 N.E.2d at 602.

33. IND. CODE § 27-12-11-1 (1993).

34. *Id.* at 602-03.

35. Dr. Siwy’s motion to dismiss was brought under Trial Rule 12(B)(6). The court of appeals addressed sua sponte whether the trial court properly treated Dr. Siwy’s motion under Trial Rule 12(B)(6) or whether the motion should have been converted to a motion for summary judgment pursuant to Trial Rule 12(B)(8). *Id.* at 603. Because Dr. Siwy supported her motion to dismiss with the submission of her deposition testimony, the court of appeals determined that the trial court erred in not considering the motion as one for summary judgment under Trial Rule 56. *Id.* The court of appeals, however, deemed the error to be harmless because Dixon was given ample opportunity to present material external to the pleadings and, in fact, submitted such material in the form of Dixon’s affidavit. *Id.* at 604. The court of appeals, therefore, treated the appeal as if it came from a grant of summary judgment by the trial court. *Id.* at 605.

36. Although not germane to the case, the court of appeals presented an excellent discussion of the distinction between subject matter jurisdiction and a court’s jurisdiction over a particular case in the context of motions for preliminary determinations of law. *Dixon*, 661 N.E.2d at 605 n.10. Generally, a medical malpractice action against a qualified health care provider may not be brought into court before the patient’s complaint is presented to a properly formed medical review panel and the panel has issued an opinion. See IND. CODE § 27-12-8-4 (1993). However, a trial court has limited jurisdiction to determine certain preliminary issues prior to the panel’s issuance of an opinion. See *id.* § 27-12-11-1. The court of appeals concluded:

[A]n otherwise competent court has subject matter jurisdiction over medical malpractice cases prior to the issuance of the review board’s opinion. However, the review board must issue its opinion before the court acquires jurisdiction *over a particular case*, except for the preliminary matters which the court may consider, pursuant to IC 27-12-11-1(a), prior to the issuance of the review board’s opinion.

Dixon, 661 N.E.2d at 606 n.10.

37. *Dixon*, 661 N.E.2d at 605 (quoting *Santiago v. Kilmer*, 605 N.E.2d 237, 240 (Ind. Ct. App. 1992)).

review panel has expressed its opinion, to rule upon issues not requiring expert opinion which can be preliminarily determined under Trial Rule 12.”³⁸

The court of appeals viewed Dr. Siwy’s motion to dismiss as a request for a determination of whether a physician-patient relationship ever existed between Dixon and Dr. Siwy. The court held that such a determination is a legal question that may be preliminarily determined under Trial Rule 12.³⁹ Therefore, the court found that the trial court had jurisdiction to consider Dr. Siwy’s motion to dismiss.⁴⁰

With respect to the merits of the motion to dismiss, Dixon argued that a physician-patient relationship arose between her and Dr. Siwy despite the fact that Dr. Siwy had no involvement in her medical care. She claimed that Dr. Siwy was aware of the practice at Wishard Hospital of residents placing the name of a faculty member on the consent form whether or not the faculty member had consulted on the case.⁴¹ Therefore, Dixon argued that a physician-patient relationship and the associated duty arose between her and Dr. Siwy at the time Dixon executed the consent form.⁴²

The court of appeals rejected Dixon’s argument stating “no authority exists for the proposition that a physician-patient relationship may be established without the physician performing some affirmative act with regard to the patient and without the physician’s knowledge.”⁴³ The court of appeals concluded that, in the absence of any evidence indicating a physician-patient relationship, there could be no liability on Dr. Siwy’s behalf for the allegedly negligent care Dixon received.⁴⁴ The trial court’s entry of judgment in favor of Dr. Siwy was, therefore, affirmed.⁴⁵

3. *Statutory Construction of the Indiana Medical Malpractice Act.*—Several cases were decided during the Survey period in which the Indiana courts construed various provisions of the Indiana Medical Malpractice Act.⁴⁶ Under Indiana law, medical malpractice claims against a qualified health care provider are governed by the Malpractice Act.⁴⁷ A health care provider’s qualification under the Act, however, is purely voluntary.⁴⁸ If a health care provider chooses to qualify under the Malpractice Act, the provider, or the provider’s insurance carrier, is required to file proof of financial responsibility with the Indiana Department of Insurance and pay a surcharge to the patient’s compensation fund.⁴⁹ Upon qualification, a

38. *Id.* at 606 (citing *Griffith v. Jones*, 602 N.E.2d 107 (Ind. 1992)). *See also* *Johnson v. Padilla*, 433 N.E.2d 393 (Ind. Ct. App. 1982)).

39. *Id.* at 606-07.

40. *Id.*

41. *Id.* at 607.

42. *See id.* at 606.

43. *Id.* at 607.

44. *Id.* at 608.

45. *Id.*

46. IND. CODE §§ 27-12-1-1 to -18-2 (1993 & Supp. 1996).

47. *See id.* § 27-12-3-1 (1993).

48. *See id.*

49. *Id.* § 27-12-3-2.

health care provider's liability is limited to \$100,000 per occurrence of medical malpractice.⁵⁰ In the event a patient's damages exceed \$100,000, the patient may seek additional compensation from the patient's compensation fund up to a maximum statutory limit of \$750,000.⁵¹ Moreover, with few exceptions, a claim for medical negligence against a qualified health care provider may not be brought as an initial matter in court.⁵² Instead, the claim must first be filed with the Indiana Department of Insurance and be presented to a medical review panel for an opinion issued in accordance with the Malpractice Act.⁵³

In *Comer v. Gohil*,⁵⁴ the Indiana Court of Appeals interpreted a provision⁵⁵ of the Malpractice Act relating to the tolling of the medical malpractice statute of limitations⁵⁶ upon the filing of a proposed complaint with the Indiana Department of Insurance. In *Comer*, Dr. Gohil performed surgery on Comer to remove a needle from the patient's foot.⁵⁷ After the operation, Comer continued to experience pain and discomfort in her foot. She later consulted with a second physician who determined that Dr. Gohil had failed to remove the entire needle from Comer's foot.⁵⁸ Comer filed a proposed complaint before the Indiana Department of Insurance in accordance with the Medical Malpractice Act and a complaint in the Howard Superior Court.⁵⁹ Comer filed her proposed complaint with the Indiana Department of Insurance by certified mail; however, insufficient postage was affixed to the mailing. At the time the proposed complaint was refiled by certified mail with proper postage, the two-year medical malpractice statute of limitations had expired.⁶⁰

Dr. Gohil initiated a separate action in the Marion Superior Court seeking a declaratory judgment that Comer's claim for medical malpractice was barred for her failure to file a proposed complaint with the Department of Insurance within the applicable statute of limitations.⁶¹ Dr. Gohil also sought dismissal of Comer's

50. See *id.* § 27-12-14-3(b).

51. See *id.* § 27-12-14-3(a), (c).

52. See *id.* § 27-12-8-4.

53. See *id.*

54. 664 N.E.2d 389 (Ind. Ct. App. 1996).

55. IND. CODE § 27-12-7-3 (1993).

56. *Id.* § 27-12-7-1. The statute of limitations contained in the Medical Malpractice Act is an occurrence statute which provides in pertinent part:

A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.

Id. § 27-12-7-1(b).

57. *Comer*, 664 N.E.2d at 391.

58. *Id.*

59. *Id.* at 390.

60. *Id.* See IND. CODE § 27-12-7-1(b) (1993).

61. *Comer*, 664 N.E.2d at 390.

complaint in the Howard Superior Court on the same theory.⁶² Both courts ultimately held in Dr. Gohil's favor.⁶³

After the Howard Superior Court dismissed Comer's complaint, Comer appealed,⁶⁴ contending initially that the filing of her proposed complaint with the Indiana Department of Insurance was effective despite the fact that she failed to affix proper postage to the mailing.⁶⁵ The court of appeals noted that, under the Indiana Code,⁶⁶ "[a] proposed medical malpractice complaint is considered filed *when mailed* by certified mail to the Commissioner of the Department of Insurance,"⁶⁷ and that upon filing the proposed complaint the statute of limitations is tolled until ninety days following the claimant's receipt of the medical review panel opinion.⁶⁸ The court further noted, however, that the payment of proper postage "was a matter wholly in Comer's hands,"⁶⁹ and consequently held that Comer's original proposed complaint had not been "filed" for purposes of the Indiana Code.⁷⁰ Comer's medical malpractice action before the Indiana Department of Insurance was, therefore, barred by the statute of limitations.⁷¹

Comer attempted to avoid the statute of limitations by arguing that the statute was tolled by the doctrine of fraudulent concealment.⁷² Comer did not discover Dr. Gohil's alleged negligence until she consulted with a second physician. Comer contended that, because she properly filed her proposed complaint within the two-year statute of limitations period following the discovery of Dr. Gohil's negligence, her proposed complaint was timely filed.⁷³

The court of appeals rejected Comer's argument on the basis that, even assuming the doctrine of fraudulent concealment applied, it did not provide two full years from the date of discovery of the alleged medical negligence in which to file a claim.⁷⁴ "Instead, the law imposes the responsibility upon the plaintiff to institute her action within a reasonable time after discovering the alleged malpractice."⁷⁵ The court of appeals held that the twenty-one-month delay between Comer's discovery of Dr. Gohil's negligence and the proper filing of the proposed complaint was unreasonable and, thus, the doctrine of fraudulent concealment did not operate to save Comer's claim before the Department of

62. *Id.*

63. *Id.* at 390-91.

64. *Id.* Comer appealed both the ruling of the Marion Superior Court and the ruling of the Howard Superior Court, and the two lawsuits were consolidated for purposes of the appeal.

65. *Id.* at 391.

66. IND. CODE § 27-12-7-3 (1993).

67. *Comer*, 664 N.E.2d at 391 (emphasis in original).

68. *Id.*

69. *Id.* at 392.

70. IND. CODE § 27-12-7-3.

71. *Comer*, 664 N.E.2d at 392.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

Insurance.⁷⁶

The court of appeals, however, reversed the dismissal. Under Indiana Trial Rule 15, the court of appeals observed that a party may file an amended pleading once, as a matter of right and without permission of the court, when no responsive pleading has been filed.⁷⁷ Further, such an amendment relates back to the date of the original pleading.⁷⁸ Because Comer's amended complaint sought damages in an amount of \$15,000 or less, Comer was not required to file a proposed complaint with the Indiana Department of Insurance.⁷⁹ Further, because Comer's amended complaint related back to the date of the original complaint filed in the Howard Superior Court, it was not subject to dismissal.⁸⁰

In *Gleason v. Bush*,⁸¹ the Indiana Court of Appeals addressed the requirement of the Malpractice Act that a medical review panel issue its expert opinion within 180 days following the selection of the last member of the panel.⁸²

The plaintiff, Lester Gleason, filed a proposed complaint for medical malpractice against the health care providers who treated him for a broken arm.⁸³ Selection of the medical review panel was completed on February 21, 1994.⁸⁴ In accordance with statute, the medical review panel's opinion was required to be issued within 180 days which was on or before August 22, 1994.⁸⁵ The lawyer chairman of the panel established a submission schedule which made the plaintiff's submission due on or before April 7, 1994.⁸⁶ After requesting two unopposed thirty-day enlargements of time to submit evidence to the panel, Gleason's counsel sent correspondence to the panel chairman requesting a third enlargement of time to submit evidence until an affidavit could be received from the plaintiff.⁸⁷ The August 22, 1994, time limit for issuance of the panel opinion expired without further correspondence from the parties.⁸⁸

The health care providers subsequently filed motions to dismiss the plaintiff's proposed complaint for failure to comply with the 180-day time limit of the

76. *Id.*

77. *Id.* at 393 (citing IND. TR. R. 15(A)).

78. *Id.* (citing IND. TR. R. 15(C)).

79. *Id.* See IND. CODE § 27-12-8-6 (1993).

80. See *Comer*, 664 N.E.2d at 393. The court of appeals concluded that neither Dr. Gohil's motion to dismiss the original Howard County complaint nor the filing of the separate action in the Marion Superior Court constituted the filing of a responsive pleading for purposes of Trial Rule 15. *Id.* at 393 n. 2. In addition, the court of appeals opined that, even if Comer was required to seek leave of the trial court to file her amended complaint, it would have been an abuse of discretion for the trial court to have denied the amendment of the complaint. *Id.*

81. 664 N.E.2d 1183 (Ind. Ct. App. 1996).

82. IND. CODE § 27-12-10-13(a) (1993).

83. *Gleason*, 664 N.E.2d at 1184.

84. *Id.*

85. See *id.*

86. *Id.*

87. *Id.*

88. *Id.*

Malpractice Act.⁸⁹ During the hearing held on the motions to dismiss, Gleason argued that he had good cause for not making his submission to the medical review panel within the required time limit.⁹⁰ Specifically, Gleason presented evidence that he was a twenty-year-old male living solely on Social Security disability benefits due to disability occasioned by the medical malpractice committed by the defendants.⁹¹ In addition, Gleason presented evidence that he had insufficient financial means to maintain personal telephone service or personal transportation and that he had changed mailing addresses approximately three times during the previous nine months.⁹² For these reasons, Gleason argued that he had good cause in failing to submit the affidavit needed by his counsel to complete the submission of evidence to the medical review panel.⁹³ The trial court rejected Gleason's arguments and granted the motions to dismiss.⁹⁴

On appeal, the Indiana Court of Appeals rejected any notion that the 180-day time limit constituted a statute of limitation stating:

We hold today that the Act's 180-day time frame, alone, is neither a statute of limitation, nor the functional equivalent of a statute of limitation. Therefore, if a panel should be unable to comply with IC 27-12-10-13(a) because of plaintiff's failure to make a timely submission, that does not automatically trigger the imposition of sanctions on either parties or panel members. Instead [under IC 27-12-10-13(b)], the panel must submit an explanation to the commissioner explaining the delay and attempt to expedite the process in a reasonable manner. The defendant may seek dismissal or other sanction by initiating a court action pursuant to IC 27-12-10-14.⁹⁵

The court of appeals acknowledged that it is within the trial court's discretion to fashion appropriate sanctions, including dismissal of the proposed complaint, when the parties or panel members are dilatory in complying with the time limitations established by the Malpractice Act.⁹⁶ The court further noted, however, that a trial court may not impose sanctions when the offending party or panel member establishes good cause for failure to comply with the requirements of the Act.⁹⁷ On the record before it, the court of appeals was unable to discern whether the trial court dismissed the proposed complaint on the basis of a proper exercise of discretion on a finding that Gleason had failed to establish good cause for his failure to submit evidence to the panel or on the erroneous belief that the Malpractice Act mandated dismissal upon the expiration of the 180-day time

89. *Id.* at 1185.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1187 (citation omitted).

96. *Id.*

97. *Id.*

requirement for the issuance of a medical review panel opinion.⁹⁸ The court of appeals, therefore, remanded the case to the trial court for determination of whether Gleason established good cause for failure to make a timely submission to the medical review panel.⁹⁹

4. *Service of Legal Process Following the Issuance of a Medical Review Panel Opinion.*—Upon completion of the medical review panel process before the Indiana Department of Insurance, an injured patient may bring suit in a court of law notwithstanding that the medical review panel may have concluded that the health care providers complied with the appropriate standard of care.¹⁰⁰ In *Bonaventura v. Leech*,¹⁰¹ the Indiana Court of Appeals addressed the issue of whether a plaintiff in a medical malpractice action must serve process upon counsel for the health care provider following completion of the action before the Indiana Department of Insurance to properly initiate a medical malpractice action in a court of law.

In *Bonaventura*, the plaintiffs filed a proposed complaint before the Indiana Department of Insurance against various health care providers alleging medical negligence.¹⁰² Following the issuance of a medical review panel opinion unanimously finding that the health care providers had failed to comply with the appropriate standard of care, the plaintiffs filed a complaint against the health care providers in Lake Superior Court.¹⁰³ The trial court granted a default judgment in favor of the plaintiffs when none of the health care providers responded to the complaint.¹⁰⁴ The health care providers moved the court to set aside the default judgment pursuant to Indiana Trial Rule 60(B) because plaintiffs had failed to serve the summons and complaint upon the attorneys who represented the health care providers in the action before the Indiana Department of Insurance.¹⁰⁵ The trial court denied the motions.¹⁰⁶

98. *Id.*

99. *Id.* The *Gleason* court was quick to note that “[o]ur holding does not depart from our previous decisions . . . and nothing in this opinion should serve as support for parties or panel members who are dilatory in upholding the letter and spirit of the [M]alpractice Act.” *Id.* Another case decided during the Survey period which addressed the 180-day time limit and the consequences of a plaintiff’s failure to submit evidence to the medical review panel was *Jones v. Wasserman*, 656 N.E.2d 1195 (Ind. Ct. App. 1995). In *Jones*, the Indiana Court of Appeals upheld the trial court’s dismissal of a patient’s proposed complaint finding that the trial court had properly exercised its discretion following a hearing in which the plaintiff was given an opportunity to explain his failure to comply with the time requirement of the Act. *Id.* at 1197.

100. IND. CODE § 27-12-8-1 (1993). Although the opinion of the medical review panel is not conclusive on the issue of liability, the Malpractice Act expressly provides for the admissibility of the panel opinion in any subsequent action brought in a court of law. *See id.* § 27-12-10-23.

101. 670 N.E.2d 123 (Ind. Ct. App. 1996).

102. *Id.* at 124.

103. *Id.*

104. *Id.*

105. *Id.* at 125.

106. *Id.* at 124-25.

On appeal, the health care providers argued that, because the medical negligence action filed in the Lake Superior Court was merely a continuation of the medical review panel proceeding before the Indiana Department of Insurance, the lawyers appearing on behalf of the health care providers before the Indiana Department of Insurance were entitled to notice of the summons and complaint.¹⁰⁷ The court of appeals held that the obligation to serve a party's attorney arises only upon the filing of an appearance on behalf of the party by the attorney.¹⁰⁸ Because there had been no appearance entered on behalf of the health care providers before the Lake Superior Court, the plaintiffs had no obligation to serve counsel on behalf of the health care providers.¹⁰⁹

In support of their contention that the action filed in Lake Superior Court was a mere continuation of the proceedings before the medical review panel, the health care providers noted that submission of a claim of medical negligence to a medical review panel was a condition precedent to the filing of a complaint in a court of law under the Malpractice Act and that the Act specifically provides that the opinion of the medical review panel is admissible in a subsequent court action.¹¹⁰ According to the health care providers, the statutory interrelationship of the two proceedings via the Malpractice Act was sufficient to render the court action filed after the medical review panel process merely a continuation of that process rather than a separate action for purposes of service of process.¹¹¹

The court of appeals rejected the arguments of the health care providers. The court observed that the action filed in the Lake Superior Court could not be considered as a review or appeal of the medical review panel opinion since neither the trial court nor a jury had authority to alter or invalidate the opinion issued by the medical review panel.¹¹² Further, the court noted that the record failed to demonstrate that the health care providers or their counsel had been misled or that the status of the case had been misrepresented by the plaintiffs or their counsel.¹¹³ Although the court acknowledged the statutory interrelationship between the two proceedings, the court concluded:

Under the statutory scheme, initiation of a legal proceeding for medical negligence is a separate action from the medical review panel process. Thus, for purposes of service of process, the attorneys who appeared before the medical review panel are not entitled to notice upon the commencement of a civil suit for medical negligence.¹¹⁴

The court of appeals, therefore, affirmed the trial court's denial of the motions of

107. *Id.*

108. *Id.* See IND. TR. R. 5(B).

109. See *Bonaventura*, 670 N.E.2d at 124-25.

110. *Id.*

111. *Id.* at 126.

112. *Id.* at 125.

113. *Id.* at 126.

114. *Id.*

the health care providers to set aside the default judgments entered against them.¹¹⁵

II. REIMBURSEMENT: PUBLIC AND PRIVATE—JUDICIAL DECISIONS

A. Medicaid Reimbursement To Providers

The changes made to the Medicaid reimbursement methodology in January 1994, led to litigation brought by Methodist Hospitals of Gary, Indiana and five physicians “contending that the new rules were invalid.”¹¹⁶ Prior to 1994, “Indiana reimbursed providers for outpatient services at the provider’s customary billing amount, but not to exceed 100% of the provider’s actual cost.”¹¹⁷ The new approach pays all providers in the State the same amount for the same service.¹¹⁸ Outpatient services are divided into nine categories, and Medicaid pays each provider the sum of 50% of the Medicare rate for that service and 50% of the statewide median amount paid for that service in 1992.¹¹⁹ Consequently, providers with higher than average costs are disadvantaged under this new system. The hospital claimed that the new outpatient rules would cost the hospitals \$1 million per year compared with the former method. The issue on appeal is whether Indiana’s rules comply with federal law,¹²⁰ which requires that every state Medicaid plan must assure that payments “are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.”¹²¹

According to plaintiffs, to ensure that every Medicaid recipient can find all essential care nearby, federal law requires comprehensive studies prior to any change in the state’s plan of reimbursement. The court noted that “plaintiff’s demand is nothing less than a complete description of supply and demand schedules for every medical specialty in every part of the state, so that before changing reimbursement rates, a state knows exactly what effect the new rate will have on the demand for, and supply of, medical care.”¹²² “[I]t is exceptionally difficult to determine demand and supply schedules for a single product. Doing this for the entire medical segment of the economy would be more than difficult; it would be impossible.”¹²³

In its conclusion, the court states that neither the language of the federal statute, nor any implementing regulation, “requires a state to conduct studies in advance of every modification.”¹²⁴ Rather, it requires states “to produce a result,

115. *Id.* at 128.

116. *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1027 (7th Cir. 1996).

117. *Id.* at 1027.

118. *Id.*

119. *Id.*

120. 42 U.S.C. § 1396a(30)(A) (1994).

121. *Methodist Hosps., Inc.*, 91 F.3d at 1029. *See* 42 U.S.C. § 1396a(30)(A).

122. *Methodist Hosps., Inc.*, 91 F.3d at 1030.

123. *Id.*

124. *Id.*

not to employ any particular methodology for getting there.”¹²⁵

B. Anti-Kickback Issues Related To Medicare and Medicaid

This Survey period has seen significant activity with regard to judicial interpretation of the Medicare/Medicaid Anti-Kickback statute.¹²⁶ As was reported in the 1995 Health Law Survey, health care providers received favorable news from the case of *Hanlester Network v. Shalala*.¹²⁷ *Hanlester* created a difficult burden for prosecutors to meet when attempting to demonstrate that a defendant's conduct under the Anti-Kickback statute was “knowing and willful.”¹²⁸ The Ninth Circuit construed the words “knowing and willful” as requiring the defendants to (1) know that the statute prohibits offering or paying remuneration to reduce referrals, and (2) engage in the prohibited conduct with a specific intent to disobey the law.¹²⁹ Thus, the Ninth Circuit found that knowledge of the illegality was required for a willful violation of the statute.¹³⁰ The holding narrowed the previous authority on this issue, *United States v. Greber*.¹³¹ In *Greber*, the Third Circuit Court of Appeals held that if one purpose of the payment is to induce referrals, then the statute is violated.¹³² *Hanlester* provided health care providers with much needed guidance. However, the *Hanlester* decision has not been fully accepted by other courts. To the contrary, three courts have recently addressed the language of the Anti-Kickback statute and have rejected aspects of the *Hanlester* case.

In *United States v. Neufeld*,¹³³ a federal district court in Ohio held that there is no requirement that a defendant must know that his or her conduct is illegal under the law. Rather, the proper interpretation simply requires “a purpose or willingness to commit the act.”¹³⁴ Further, the court noted that when a physician performs a service for monies received, if any one purpose of the arrangement is to induce referrals, then the law has been violated.¹³⁵

125. The court also considered Indiana's argument that it was entitled to attorney's fees and affirmed the district court's denial of this request. See 42 U.S.C. § 1988 (1994).

126. *Id.* § 1320a-7b(b). The Anti-Kickback statute provides, subject to exceptions, “whoever knowingly and willfully offers, pays, solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly in cash or kind,” in return for or to induce the referral of patients or business for which payment may be made in whole or in part by Medicare, Medicaid, or certain other state health programs is guilty of a felony. *Id.* Violation of the statute can result in a fine of up to \$25,000 or imprisonment for up to five years, or both. See *id.*

127. 51 F.3d 1390 (9th Cir. 1995).

128. *Id.*

129. *Id.* at 1399.

130. *Id.*

131. 760 F.2d 68 (3d Cir. 1985).

132. *Id.* at 72.

133. 908 F. Supp. 491 (S.D. Ohio 1995).

134. *Id.* at 495.

135. *Id.*

The case of *Medical Development Network, Inc. v. Professional Respiratory Care/Home Medical Equipment Services, Inc.*,¹³⁶ addresses the application of the Anti-Kickback statute to arrangements with entities other than health care providers, specifically a commission-based payment arrangement. The *Medical Development* court held that the Anti-Kickback statute does not apply only to health care providers, but rather, decided that any arrangement within the contemplation of the statute will suffice.¹³⁷ The court specifically rejected the two-tiered approach to the interpretation of the words “knowingly and willingly” in the *Hanlester* decision.¹³⁸ The court stated that the statute is directed at punishment of those who perform specific acts and does not require that one engage in the prohibited conduct with the specific intent to violate the statute.¹³⁹

A third case, *United States v. Jain*,¹⁴⁰ addressed the mens rea standard applicable to a physician who is convicted of violating the Anti-Kickback law for receiving payments from a psychiatric hospital for referring patients to that hospital. The court upheld the district court’s jury instruction that the word “willfully” means the defendant knew his conduct was unjustifiable and wrongful and that “good faith” was a defense to the charge.¹⁴¹ Thus, under this court’s interpretation, the standard for conviction under the Anti-Kickback statute requires that the defendant know that his conduct is wrong, but not that it is in violation of the law itself.

C. Determining Responsible Parties For Reimbursement

Two cases from this Survey period are significant in terms of defining the parties who are and are not responsible for the payment of health care costs. The Indiana Court of Appeals in *St. Mary’s Medical Center v. Warrick County*¹⁴² held that a hospital was entitled to be reimbursed by the county sheriff for the cost of medical services provided to a prisoner under the county sheriff’s control. In *St. Mary’s*, while a the prisoner was incarcerated and awaiting court proceedings, he attempted suicide. He was treated at Warrick Hospital, but was later transferred to *St. Mary’s Medical Center* when he required services not available at Warrick Hospital. The county sheriff paid Warrick Hospital for the care rendered to the prisoner at the hospital, but refused to pay *St. Mary’s* for the medical services it had provided.

St. Mary’s contended that the county sheriff had a duty to pay for the hospital care that it provided while the prisoner was in the custody and control of the county sheriff. The sheriff responded that *St. Mary’s* was obligated, yet failed, to seek payment from the Department of Public Welfare pursuant to the Hospital

136. 673 So. 2d 565 (Fla. Dist. Ct. App. 1996).

137. *Id.* at 567.

138. *Id.*

139. *Id.*

140. 93 F.3d 436 (8th Cir. 1996).

141. *Id.* at 441.

142. 671 N.E.2d 929 (Ind. Ct. App. 1996).

Care for the Indigent Act (HCI),¹⁴³ rather than seeking payment from the sheriff. The HCI program is intended to make cost-free emergency care readily available to indigent persons who suffer serious physical injury.¹⁴⁴ Further, Indiana law requires hospitals to provide patients with information regarding HCI eligibility and benefits if “the hospital has reason to believe that the patient may be indigent.”¹⁴⁵ Thus, the court considered whether the prisoner’s status as a jail inmate who had attempted suicide supports the inference that St. Mary’s had reason to believe that the prisoner may have been indigent.

The court held that because St. Mary’s was not obligated to seek HCI benefits, as it had no reason to believe that the prisoner “may” have been indigent, the county sheriff is responsible for the cost of medical services provided to the prisoner. Finally, the court added the caveat that “where a hospital is placed on actual or inquiry notice that a prisoner may be indigent, the HCI statute applies, and the hospital is not relieved of its responsibility to seek HCI benefits merely because a Sheriff has a duty to pay for a prisoner’s medical care.”¹⁴⁶

In *Bryant v. Mutual Hospital Services*, the Indiana Court of Appeals protected a parent or guardian from liability for the cost of medical services provided to a minor under certain circumstances.¹⁴⁷ In *Bryant*, a grandmother (hereinafter “Mother”) adopted her granddaughter (hereinafter “Daughter”). Daughter subsequently ran away from home and was later the subject of multiple delinquency proceedings and had a child out-of-wedlock. Daughter was then placed in foster care, from which she ran away. She was then arrested and placed in a youth shelter. The hospital treated Daughter on numerous occasions for both venereal disease and depression. Hospital, in turn, sued Mother for the amounts owed to the hospital for such treatment. The trial court entered judgment in favor of the hospital, and Mother appealed.¹⁴⁸

Although the appeals court noted that, under certain circumstances, Indiana law implies a promise by a parent/guardian to pay for necessities furnished to a minor child/ward, where a parent/guardian is willing and ready to make suitable provision for the child, the parent is not liable for the necessities furnished by others without its consent.¹⁴⁹ Further, the court held that when an adequately supported minor child reaches the age of discretion and abandons the parent’s/guardian’s home, he no longer has the right to bind the parent for his necessities.¹⁵⁰ In its analysis, the court considered the fact that Daughter had abandoned her mother’s home to escape parental discipline, and the medical

143. IND. CODE §§ 12-16-3-1 to -4 (1993).

144. *Id.* § 12-16-3-1. This section delineates the medical criteria an individual must satisfy to qualify for HCI benefits.

145. *Id.* § 12-16-3-4.

146. *St. Mary’s Med. Ctr.*, 671 N.E.2d at 933.

147. 669 N.E.2d 427 (Ind. Ct. App. 1996). This case has come to be known as the “Wayward Ward” case.

148. *Id.*

149. *Id.*

150. *Id.*

services had been necessary due to her refusal to submit to the reasonable restraints imposed by her mother.¹⁵¹ Accordingly, the court found that Mother was not liable for the provision of medical services to Daughter.¹⁵²

III. CHANGES TO HMO STATUTE

Effective July 1, 1996, Senate Enrolled Act 378¹⁵³ made several important changes to Indiana law regarding regulation of health maintenance organizations (HMO).¹⁵⁴ The statute allows entities owned in whole or part by health care providers to become a "participating provider" under HMO law that permits physician hospital organizations and other organizations with multiple ownership to be eligible to participate fully in providing health services for an HMO.¹⁵⁵ The Act also provides that a participating provider may contract with another health care provider to provide health services to enrollees of an HMO with neither provider being required to obtain a certificate of authority from the Indiana Department of Insurance (IDI).¹⁵⁶

In a substantial modification of the methodology to compute an HMO's net worth to comport with the requirement of the general HMO law, the Act now permits inclusion of value attributable to medical equipment. The value of these assets may be included within total assets if:

- (1) owned by the HMO and not subject to lien, claim or encumbrance;
- (2) used, at least in part, to treat, diagnose, or care for HMO enrollees;
- (3) the equipment has an initial cost of at least three thousand dollars (\$3,000.00);
- (4) the equipment has a useful life of at least two (2) years; or
- (5) More than thirty percent (30%) of the total HMO net units consists of medical equipment.¹⁵⁷

Net worth of an HMO may include without limit the value of owned data processing equipment used in HMO operations if it is not subject to any lien, claim or encumbrance.¹⁵⁸

A. Anti "Gag Orders" and Primary Care Providers

Senate Enrolled Act became law on July 1, 1996, and prohibits inclusion of

151. *Id.* at 430.

152. *Id.*

153. Act of Mar. 18, 1994, § 25, 1994 Ind. Acts 552, 578-641 (codified as amended at IND. CODE §§ 27-13-1-1 to -35-1 (Supp. 1996)).

154. An HMO "is a person that undertakes to provide or arrange for the delivery of health care services on a prepaid basis, except enrollee responsibility for copayments or deductibles." IND. CODE § 27-13-1-19 (Supp. 1996).

155. *Id.* § 27-13-1-28(b).

156. *Id.* § 27-13-2-2(b).

157. *Id.* § 27-13-12-1(c)(1).

158. *Id.* § 27-13-12-1(c)(2).

certain provisions in managed health care contracts. HMO and preferred provider organizations (PPO) participating health care provider agreements may not preclude providers from disclosing to enrollees information regarding financial incentives given to providers and treatment options available, even if not covered under the enrollee's policy or contract. A health care provider may not be penalized by an insurer or an HMO for disclosing information regarding incentives or treatment options.¹⁵⁹ The law also allows women enrollees to select specialists in obstetrics and gynecology as the primary care physician under a managed care contract.

B. Regulation of Telemedicine

House Enrolled Act 1274, which became effective July 1, 1996, provides that treatment or diagnostic services provided to patients in Indiana when transmitted through electronic communication on a regular, routine basis, or pursuant to an agreement to provide such services, constitutes the practice of medicine requiring an Indiana medical license.¹⁶⁰ An Indiana license is not required for a non-resident physician rendering treatment or diagnostic services if such services constitute a second opinion or are in follow-up to care rendered to a patient originally treated outside of Indiana.¹⁶¹

C. Expiration of Certificate of Need

Since 1987, Indiana has had in place a form of a certificate of need (CON) program requiring approval for the construction, addition or conversion of beds for use as comprehensive care beds in a comprehensive care facility.¹⁶² However, licensed hospitals¹⁶³ were permitted to convert up to fifty acute care beds to comprehensive care beds without the necessity of a CON.¹⁶⁴ The statute which required a CON expired on July 1, 1996.¹⁶⁵ Consequently, since July 1, 1996, a CON has not been required for the construction, addition or conversion of beds to comprehensive care use.

D. Transferability of Health Insurance Programs

The Federal Health Insurance Portability and Accountability Act ("Act")

159. *Id.* §§ 27-8-11-4.5, 27-13-15-1(a)(2), (3).

160. *Id.* § 25-22.5-1-1.1(a)(4).

161. *See id.*

162. A comprehensive care facility is a health facility licensed under IND. CODE § 16-28-2-1 (1993) and which is certified for participation in a state or a federal reimbursement program including Title XVII or Title XIX of the Social Security Act (42 U.S.C. §§ 1395-1395ccc (1994 & Supp. I. 1995) and *id.* §§ 1396-1396u).

163. Hospitals are licensed pursuant to IND. CODE § 16-21-2-2 (1993).

164. IND. CODE § 16-29-3-2 (1993).

165. *Id.* § 16-29-1-16 (Supp. 1996).

became effective August 21, 1996.¹⁶⁶ The Act is designed to remove barriers to employees changing jobs and retaining health insurance coverage and will likely require substantial revisions to many group health plans and employer benefits policies. The statute created a new part of the Employee Retirement and Income Security Act of 1974 (ERISA),¹⁶⁷ which generally applies to any welfare benefit plan that provides medical coverage to employees or their dependents whether directly or indirectly.

The principal insurance requirements of the Act are the establishment of minimum eligibility criteria whereby an individual who provides a certificate of previous coverage must be enrolled into a new employer's group health insurance plan. The prior coverage is considered creditable coverage unless that coverage is followed by at least a sixty-three day period of non-coverage. Group health plans are required by the Act to provide written certification of creditable coverage when an individual ceases to be covered under a plan.

Pre-existing condition exclusions may be imposed upon an individual under a new health plan only if: (i) the exclusion relates to a condition treated or received six months prior to the proposed enrollment date; (ii) the exclusion does not exceed twelve months after enrollment (eighteen months in the instance of a late enrollee); and (iii) the period of exclusion is licensed by the length of any immediately preceding period of creditable coverage (excluding waiting periods).¹⁶⁸ Pregnancy and genetic predisposition may not be considered as pre-existing conditions.¹⁶⁹ Children new to a family and enrolled within thirty days of arrival also may not be subjected to pre-existing condition exclusions.¹⁷⁰

The Act does not apply to all plans, employers or benefits and excludes from its requirements coverage for accident or disability income insurance, supplements to liability insurance, liability insurance including general and automobile coverage, worker's compensation coverage, automobile medical coverage, credit only insurance and coverage for on-site medical clinics.¹⁷¹ The Act will likely change most employer health plans throughout the country.

E. House Enrolled Act 1075

During the 1996 legislative session, the Indiana General Assembly passed legislation concerning insurance and HMO coverage for postpartum hospital stays. The legislation, House Enrolled Act 1075,¹⁷² was a response to the practice of certain health insurance companies and HMOs of denying payment on behalf of enrollees for in-hospital care received by a mother and newborn more than twenty-

166. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

167. 29 U.S.C.A. §§ 1181-1191(c) (West Supp. 1997).

168. *Id.* § 1181(a).

169. *Id.* § 1181(b)(1)(B), (d)(3).

170. *Id.* § 1181(d)(1).

171. *Id.* § 1191b(c)(1).

172. IND. CODE §§ 27-8-24-1 to -5 (Supp. 1996).

four hours after an uncomplicated vaginal birth, and more than forty-eight hours after an uncomplicated cesarean birth. Effective July 1, 1996, the new legislation requires various types of insurance policies and HMO contracts that provide maternity benefits to cover a postpartum stay in the hospital that is of a duration consistent with the minimum postpartum hospital stay guidelines published by the American Academy of Pediatrics and the American College of Obstetricians and Gynecologists in their *Guidance for Parental Care*.¹⁷³ Simply stated, these guidelines provide for a minimum forty-eight hour postpartum stay at a hospital in the event of an uncomplicated vaginal birth, and a minimum seventy-two hour postpartum stay in the event of an uncomplicated cesarean delivery. The legislation allows health insurance policies and HMO contracts to provide coverage for shorter period of time, but only if the mother's physician determines that further inpatient care is not necessary for the mother or the newborn child, and the policy or contract authorizes at least one at-home post-delivery care visit to be conducted not later than forty-eight hours following the mother's and newborn's discharge from the hospital.

IV. ADMINISTRATIVE ACTIVITY

A. *Reimbursement For Teaching Physician*

On December 8, 1995, the Health Care Financing Administration (HCFA) promulgated new regulations¹⁷⁴ establishing criteria for billing by teaching physicians involved in residency programs. These regulations went into effect July 1, 1996.

Under the new regulations, the general rule is that if a resident participates in a service furnished in a teaching setting, the teaching physician must be "physically present" during the provision of the key portion of the service or procedure in order for it to be billable to Medicare.¹⁷⁵ As a result, teaching physicians must be present during the portion of the services that determine the level of services to be billed. For example, in cases of complex or high-risk surgical procedures, the teaching physician must be present during all critical portions of the surgery in order for the teaching physician's professional services to be billed.¹⁷⁶

The presence of the teaching physician during the key portion of this service or procedure must be documented. This documentation requirement can be satisfied by notes in the medical records made by a physician, resident or nurse. However, in the case of evaluation and management procedures, the teaching

173. *Id.* § 27-8-24-4.

174. 42 C.F.R. § 415.172(a) (1996).

175. *Id.*

176. *See id.* § 415.172(a)(1). The new regulations eliminate the requirements that the attending physician physically examine the patient, that the attending physician be recognized by the patient's personal physician, and that one physician be the attending physician for an entire inpatient episode.

physician must personally document his participation by a notation in the medical record.

B. Reimbursement For Medical Devices

HCFA also promulgated new regulations concerning Medicare coverage for medical devices subject to the FDA's Investigational Device Exemption (IDE). Effective November 1, 1995, nonexperimental/investigational devices are covered by Medicare subject to the usual Medicare criteria and relevant FDA protocol restrictions.¹⁷⁷ The new rule is designed to allow greater Medicare beneficiary access to leading edge technology and respond to a mandate that federal agencies streamline regulations and be more customer oriented.

The key to the new regulation is a classification process conducted by the FDA which places devices into three (3) classes and two (2) different categories. Quarterly, HCFA will announce IDE categorizations and device eligibility for coverage. Providers may use this guidance to determine if a device may be covered. However, the devices used in a hospital must satisfy the protocol procedures and other Medicare requirements. Moreover, HCFA has indicated that Medicare beneficiaries will not have to pay for the use of non-covered devices where the beneficiary was not informed that the device is not covered.

C. Reimbursement To Out Of State Provider

In November 1996, a Final Agency Order¹⁷⁸ from FSSA overturned a favorable decision by an administrative law judge requiring OMPP to reimburse the Children's Hospital of Philadelphia in excess of \$180,000. This matter arose when conjoined (siamese) twins born to Indiana resident parents were admitted to the Hospital to have a surgical separation procedure performed.

Under the Indiana law in force at the time of the twins' admission, Indiana Medicaid reimbursement for out-of-state hospitals was to be in "accordance with the reimbursement methodology of the provider's state."¹⁷⁹ Midway through the subsequent hospital stay of 296 days, reimbursement for out-of-state providers who participate in the Indiana Medicaid program was changed by passage of a new code,¹⁸⁰ whereby out-of-state providers were assigned a rate of \$601 per day.

The OMPP argued at the administrative hearing that the Hospital had orally agreed to a \$997 per diem reimbursement rate, which would require the Hospital to absorb \$180,000 more than what would have been required under either states' laws. The ALJ found for the Hospital, however, FSSA overturned this decision on appeal. Children's Hospital of Philadelphia has filed a petition for judicial review of FSSA's decision under the Administrative Orders and Procedures Act.

177. *Id.* § 405.201-215, -.753, -.877; § 411.15, -.406 (1996).

178. Children's Hosp., No. L9410-180 (Ind. FSSA May 13, 1996) (final agency order).

179. IND. ADMIN. CODE tit. 405, r. 1-7-4(c)(7) (1992).

180. *Id.* r. 1-10-4 (1993).

D. New Anti-Kickback Safe Harbors

Under a final rule issued by the Department of Health and Human Services Office of Inspector General (OIG), three (3) existing "safe harbor" regulations under the Medicare/Medicaid Anti-Kickback legislation were revised.¹⁸¹ Such safe harbors are intended to protect from prosecution certain conduct by health care providers and managed care plans.¹⁸²

These safe harbors clarify existing safe harbors in the areas of waivers of co-payments and deductibles, incentives of to enrollees, and price reductions offered by providers to health plans.

V. HEALTH CARE PROVIDERS/PATIENT RIGHTS—JUDICIAL DECISIONS

A. Physician-Assisted Suicide

Recently, the U.S. Supreme Court upheld state authority to criminalize physician-assisted suicide.¹⁸³ These decisions are discussed by Professor Rosalie Berger Levinson in this issue.¹⁸⁴

Besides the two Supreme Court decisions, an additional case of interest is *Kevorkian v. Arnett*.¹⁸⁵ This case held that competent adult patients have a fundamental substantive due process right to physician assisted suicide and struck down the California statute criminalizing the physician-assisted suicide.¹⁸⁶ Although claims for both due process and equal protection were made in this case, the court upheld only the due process claim and did not address the equal protection claim at this time.

B. Emergency Medical Treatment and Active Labor Act

The Fourth Circuit recently issued an opinion clarifying utilization of the Emergency Medical Treatment and Active Labor Act (EMTALA).¹⁸⁷ In *Bryan v.*

181. 42 U.S.C. § 1320a-7b(b) (1994). See *supra* note 126.

182. In an effort to alleviate the concern of prosecution under the Anti-Kickback statute, the OIG has issued various "safe harbor" regulations which set forth standards and guidelines that, if met, allow specific business arrangements and payment practices not to be treated as a criminal offense under the statute. There is no affirmative obligation to meet any safe harbor, as the safe harbors are designed only to provide a means through which individuals and entities can be assured that their arrangements are immune from potential criminal and administrative sanctions under this law. See 42 C.F.R. § 1001.952 (1996). If a practice does not fall within a safe harbor, it has precisely the same legal risk that it had before the safe harbor was promulgated.

183. *Vacco v. Quill*, 117 S. Ct. 2293 (1997); *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

184. Rosalie Berger Levinson, *State and Federal Constitutional Law Developments*, 30 IND. L. REV. 965, 987-89 (1997).

185. 939 F. Supp. 725 (C.D. Cal 1996).

186. *Id.* at 731.

187. 42 U.S.C. § 1395dd (1994).

Rectors and Visitors of the University of Virginia,¹⁸⁸ the Fourth Circuit answered a number of questions with respect to ongoing treatment obligations of a hospital under EMTALA and also attempted to explain its previous decision, *In re Baby K*.¹⁸⁹

Cindy Bryan, as administratrix of the Estate of Shirley Robertson, brought an action against the University of Virginia under EMTALA. The complaint alleged that the hospital violated EMTALA when, having treated Mrs. Robertson for an emergency medical condition for twelve days, determined that no further efforts to prevent her death would be made. Mrs. Robertson died eight days later. The hospital received direction from the family of Mrs. Robertson to take all necessary measures to “keep her alive and trust in God’s wisdom,”¹⁹⁰ but the hospital refused to follow the direction of the family and entered a Do Not Resuscitate order. The district court dismissed the action and held that once the patient was admitted to the hospital, the hospital’s obligations are covered by state tort law and not EMTALA. In her appeal, Ms. Bryan contended that the hospital has an ongoing responsibility to continuously “stabilize” the condition of the patient no matter how long the treatment is required to maintain that condition. Subsection (b)(1) of EMTALA provides:

If an individual . . . comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—

- (A) . . . for such further medical examination such treatment as may be required to stabilize the medical condition, or
- (B) for transfer of the individual to another medical facility¹⁹¹

The appellant argued that if a hospital “accepts a patient with an emergency medical condition either by admission or transfer and continues stabilizing treatment for any period of time, whether it be one hour, one week or twelve days, and then refuses such stabilizing treatment, such refusal of stabilizing treatment without transfer violates EMTALA.”¹⁹² The court of appeals rejected Bryan’s argument stating, “Under this interpretation, every presentation of an emergency patient to a hospital covered by EMTALA obligates the hospital to do much more than merely provide immediate, emergency stabilizing treatment with appropriate follow-up.”¹⁹³

Recognizing that EMTALA is a limited “anti-dumping” statute and not a federal malpractice statute, the court refused to extend its reading to require hospitals to provide treatment to patients indefinitely. Citing Congressional intent for EMTALA,¹⁹⁴ the court held that,

188. 95 F.3d 349 (4th Cir. 1996).

189. 16 F.3d 590 (4th Cir. 1994).

190. *Bryan*, 95 F.3d at 350.

191. 42 U.S.C. § 1395dd(b)(1) (1994)).

192. *Bryan*, 95 F.3d at 350.

193. *Id.* at 351.

194. In its opinion, the court quotes the Congressional Record including remarks by Senators

[O]nce EMTALA has met that purpose of ensuring that a hospital undertakes stabilizing treatment for a patient who arrives with an emergency medical condition, that patient's care becomes the legal responsibility of the hospital and the treating physicians. And, the legal adequacy of that care is then governed not by EMTALA but by the state malpractice law that everyone agrees EMTALA was not intended to preempt.¹⁹⁵

The appellant, in this case, attempted to rely on the Fourth Circuit's previous conclusion in the case, *In re Baby K*. The hospital sought declaratory judgment stating that the prevailing standard of care for anencephalic infants should provide the standard for its compliance with EMTALA's requirement of stabilization of the patient's respiratory distress. The Fourth Circuit rejected that contention, holding that EMTALA's stabilization requirement focused upon the patient's emergency medical condition, not her general medical condition. In *Baby K*, the requirement was to provide stabilizing treatment of the condition of respiratory distress, without regard to the fact that the patient was anencephalic or to the appropriate standard of care for that general condition. The court reiterated that the holding in *Baby K* did not present the issue of "temporal duration of that obligation, and certainly did not hold that it was of indefinite duration."¹⁹⁶ The court made no ruling on any potential medical malpractice cause of action against the hospital; rather, held that the conduct of the hospital did not violate EMTALA.

C. Abortion Law

In *A Women's Choice-East Side Women's Clinic v. Newman*,¹⁹⁷ the Indiana Supreme Court held that the medical emergency provision applicable to Indiana's abortion statute,¹⁹⁸ permits dispensing with the informed consent requirements when the attending physician concludes, based on his/her medical judgment and in good faith, that medical complications in the patient's pregnancy indicate the necessity of a therapeutic abortion.

Because the slate upon which the court was required to write concerning this issue was "not merely clean, but spotless,"¹⁹⁹ the court looked to other jurisdictions for guidance, but found none. Indiana's abortion law defines "medical emergency" as

a condition that, on the basis of the attending physician's good faith clinical judgment, complicates the medical condition of a pregnant

Durenberger, Kennedy, Dole, Baucus, Heinz and Proxmire, emphasizing that the source of EMTALA was a widely reported scandal on emergency rooms increasingly dumping indigent patients from one hospital to the next while the patient's emergency condition worsened. *Id.*

195. *Id.*

196. *Id.* at 352.

197. 671 N.E.2d 104 (Ind. 1996).

198. IND. CODE §§ 16-34-2-1 to -7 (1993 & Supp. 1996).

199. *A Women's Choice-East Side Women's Clinic*, 671 N.E.2d at 107.

woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function.²⁰⁰

If such a medical emergency exists, the requirement to obtain consent of the pregnant woman is abrogated.

In consideration of the first question, whether the abortion statute excuses compliance with Indiana's informed consent law when such compliance *would pose a significant threat to the life or health of the woman*, the court concluded that a doctor's regard for all relevant factors pertaining to a woman's health is implicit in the term "clinical judgment." If the diagnosis "indicates that an abortion is medically necessary, then the physician may perform it without delay."²⁰¹ The court also stated that a positive provision for immunity is not necessary to shield a physician from prosecution on the basis of professional judgment.

In response to the second question, whether the medical emergency exception excuses compliance with the informed consent laws when such compliance *threatens to cause severe but temporary physical health problems for the woman*, the court held that the statute allows only death or substantial and irreversible impairment to excuse compliance with its informed consent provisions.²⁰² Because temporary problems pass and are not ordinarily of such severity that they necessitate treatment by abortion, they are not covered by the exception.²⁰³

To the third question, whether compliance with the statute's informed consent provisions may be excused when compliance *threatens to cause the woman severe psychological harm*, the court responded that persons who suffer mental health injuries are often substantially and irreversibly disabled. A physician treating a woman faced with this risk may be excused from compliance with the informed consent requirements when the physician concludes, through good faith clinical judgment, that an abortion is medically indicated.²⁰⁴

The Indiana Supreme Court's broad interpretation of the medical emergency exception, allowing physicians to dispense with the informed consent requirements in certain instances, is significant in that Indiana is the first state to define the medical emergency exception. According to this decision, physicians are now provided with immunity for dispensing with informed consent requirements when there is a significant threat to the life, health, or psychological well-being of the woman. Physicians may not, however, dispense with the informed consent requirements when compliance with such requirements threatens to cause severe, but temporary physical health problems for the woman.

200. IND. CODE § 16-18-2-223.5 (Supp. 1996).

201. *A Women's Choice-East Side Women's Clinic*, 671 N.E.2d at 109.

202. *Id.*

203. *See id.* at 111.

204. *Id.*

VI. TAX ISSUES: TAXPAYER BILL OF RIGHTS

From a federal perspective, one of the most significant developments during the last Survey period is the Taxpayer Bill of Rights 2²⁰⁵ ("The Act") which presents new tax planning challenges for exempt hospitals, integrated delivery systems, and for physicians and others who deal with such entities. The Act provides for a series of penalty excise taxes where exempt organizations (i) pay unreasonable compensation to individuals that are in a position to substantially influence the organization; (ii) pay compensation based in whole or in part on the revenues of the organization in a manner that results in private inurement; or (iii) enter into agreements that result in them paying more for assets than such assets are worth or selling assets for less than they are worth.²⁰⁶ Significantly, the Act imposes these taxes on both the recipient of such improper payment and on the person(s) in the tax exempt organization who participated in the transaction, not on the organization itself.²⁰⁷

The significance of the Act is emphasized by the retroactive application of the penalty provisions, more commonly referred to as the "intermediate sanctions."²⁰⁸ Prior to this Act, revocation of the tax exempt status of an organization was the only sanction available to the IRS in connection with prohibited transactions. The new legislation now allows the IRS to take less dramatic measures raising additional revenue.

In a recent change of position, the IRS increased flexibility for substantial physician representation on the governing boards of tax exempt Integrated Delivery Networks (IDN). The new "facts and circumstances" approach will replace the highly criticized 20% safe harbor rule, which restricted the number of financially interested physicians to 20% of the Board. The IRS decided to ease the guidelines as it has become more comfortable with IDNs and their operations.

The current view of the IRS for newly created organizations is to allow physicians and other individuals with a financial interest to constitute up to 49% of the Board. The remaining 51% representation is to come from the community. The purpose of the community Board members, according to the IRS, is to demonstrate that the organization operates to promote the health of the community as a whole and not to benefit private individuals. The IRS also requires a proper conflict of interest policy covering the transactions of financially interested individuals of all organizations in the health care system.

VII. ANTITRUST ISSUES

A. *Judicial Developments—Market Definitions*

During this Survey, the courts have continued to grapple with definitions of

205. Pub. L. No. 104-168, §§ 1311-1314, 110 Stat. 1452, 1475-81 (1996).

206. I.R.C. § 4958(c) (West Supp. 1997).

207. *Id.* § 4958(a).

208. The intermediate sanctions are applicable to transactions entered into after September 14, 1995.

both the relevant product and geographic markets in the area of antitrust. In late 1995, two federal courts rejected the government's use of traditional antitrust analysis to describe the geographic markets narrowly. The new view supported inference that an injury to competition was likely to result from hospital mergers and looked instead to where patients could reasonably turn for inpatient hospital services.

In *United States v. Mercy Health Services*,²⁰⁹ the U.S. District Court for the Northern District of Iowa denied the U.S. Department of Justice's (DOJ) efforts to obtain an injunction to block the partnership of two Dubuque, Iowa, hospitals—Mercy Health Services and Finley Hospital. The DOJ alleged that the proposed partnership would substantially lessen competition for acute inpatient hospital services in a geographic area consisting of Dubuque County and the surrounding area. However, the court rejected this proposed definition of the particular market, stating that the government's proposed geographic market rested too heavily on past market conditions and made invalid assumptions as to the reactions of third-party payors and patients to price changes. Instead, the court found that the Dubuque hospitals compete for inpatient admissions with other "regional" hospitals located seventy to one hundred miles away.²¹⁰ Thus, the geographic market had to include these hospitals. In such a large market, the hospitals had too little a share of the market to raise antitrust concerns. Therefore, the court concluded that the merger of the only two hospitals in Dubuque County would not be anti-competitive. Subsequently, the two hospitals abandoned their merger plans. The Eighth Circuit concluded that the case had become moot and vacated the district court's decision.

In a similar case, *FTC v. Freeman Hospital*,²¹¹ the FTC sought a preliminary injunction to prevent a merger of two hospitals in Joplin, Missouri. The Eighth Circuit affirmed the district court's denial of the injunction, because the FTC failed to meet its burden of proving a relevant geographic market. Similar to the court's decision in *Mercy Health Services*, the Eighth Circuit held that the FTC was required to present evidence addressing the critical question of where consumers of acute care inpatient hospital services could practically turn for alternative sources of such services should the hospitals' merger be consummated and Joplin hospital prices become anti-competitive.

The court found that the FTC failed to produce such evidence. The evidence produced by the FTC to support its proposed geographic market—Joplin, Missouri and areas located within a twenty-seven mile radius of the city—consisted primarily of an analysis illustrating current patient flow into and out of the three hospitals located in Joplin. The court found that this analysis gave a static, rather than a dynamic, picture of the acute care market in Joplin and the surrounding area.

Like most hospital merger cases, the *Mercy Health Services* and *Freeman Hospital* decisions turned on the definition of the market; both hospitals prevailed

209. 902 F. Supp. 968 (N.D. Iowa 1995), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997).

210. *Id.* at 972.

211. 69 F.3d 260 (8th Cir. 1995).

by attacking the traditional geographic market premise on which the government relied. The courts' broad definition of the geographic market in both Joplin, Missouri, and Dubuque, Iowa, allowed both hospitals to overcome challenges launched by the FTC and the DOJ. Nonetheless, at least one court has rejected the dynamic market analysis utilized in Joplin and Dubuque in favor of a more traditional geographic market definition.

In September 1996, the U.S. District Court for the Western District of Michigan denied FTC's request for a preliminary injunction to help the proposed merger of two Michigan hospitals.²¹² The FTC challenged the proposed merger of two Grand Rapids hospitals—Butterworth Health Corporation and Blodgett Memorial Medical Center—on the ground that it would have the effect of substantially lessening competition contrary to section 7 of the Clayton Act.²¹³ The court found the proposed merger lawful despite the fact that they would control 47% to 65% of the general acute care inpatient services in the surrounding area and 65% to 70% of the primary care inpatient services in Grand Rapids.

The *Butterworth* court's analysis of the relevant market is a departure from the norm in that the government alleged a second, less extensive product market.²¹⁴ The court was satisfied that the FTC had adequately established that general acute care inpatient hospital services and primary care inpatient services were relevant product markets.

The *Butterworth* court took a different approach from the *Mercy Health Services* and *Freeman Hospital* decisions, which defined broad geographic markets and defeated government challenges to hospital mergers. Specifically, the court accepted the FTC's definition of the relevant geographic market for general acute care inpatient hospital services as Grand Rapids and the area encompassed within its thirty mile radius. With respect to the primary care inpatient hospital services, the relevant market was determined to be the immediate Grand Rapids area because of the unwillingness of patients to travel significant distances to receive primary care inpatient services.²¹⁵

Although the FTC successfully established a prima facie case that the proposed merger would violate section 7 of the Clayton Act, the defendant successfully rebutted this prima facie case with evidence that the proposed merger was not likely to cause anti-competitive effects.²¹⁶ The court's reliance on several

212. *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996).

213. 15 U.S.C. § 18 (1994).

214. The FTC identified two alternative product markets in which the merged entity would possess substantial market power: (i) general acute care inpatient services, the traditional product market for hospital mergers; and (ii) primary care inpatient hospital services, including "basic or less complex services available at most general acute care hospitals." *Butterworth*, 946 F. Supp. at 1290.

215. *See id.* at 1293.

216. In reaching its decision, the court was cognizant not only of antitrust policy, but of competing public policies as well. Specifically, the court considered empirical proof that higher hospital concentration in Michigan was actually associated with lower non-profit hospital prices. Moreover, the court was persuaded that the involvement of prominent community and business

non-economic, non-traditional defenses suggests that a presumption of anti-competitive effects when there exists high market concentration in the relevant market may not always be appropriate.

On November 18, 1996, the FTC issued an administrative complaint challenging the proposed merger as anti-competitive. In addition, the FTC announced that it will appeal the district court's decision to deny FTC's request for a preliminary injunction.

B. Administrative Developments

One area of particular concern in the health care industry over the past few years has been the application of "rule of reason" analysis to collective conduct by partially integrated provider groups. On August 28, 1996, the DOJ and the FTC issued revised Antitrust Enforcement Guidelines for the health care industry which address this issue. Where provider integration through a network is likely to produce significant efficiencies, any agreement on price "reasonably necessary" to accomplish the venture's procompetitive benefits will be analyzed under the rule of reason according to the revisions to Statements 8 and 9, dealing with physician network joint ventures and multiprovider networks respectively.²¹⁷ The Agencies indicated that their revisions were made in response to evolving market arrangements involving joint activity by health care providers and the agencies' additional experience with evaluating the competitive impact of joint provider activity.

The previous version of Statement 8, dealing with physician network joint ventures, issued in September 1993, provided an antitrust "safety zone" for integrated physician networks that jointly marketed physician services and collectively agreed on the prices at which their services would be offered to payors. The safety zone applied to exclusive and non-exclusive non-integrated networks that included fewer than 20% or 30%, respectively, of the physicians in any physician specialty with active hospital staff privileges who practice in the relevant geographic market. The safety zone only explicitly recognized, however, two acceptable forms of integration—capitation and significant risk withholds.

The revised Statement 8 retains the 20% and 30% size thresholds for exclusive and non-exclusive networks, but provides an expanded discussion of what constitutes "integration" for purposes of antitrust analysis. The revised Statement 8 recognizes that financial integration can be accomplished by physician networks that share substantial financial risk via capitation, risk withholds, percentage of premium or percentage of revenue payment methodologies, global pricing or

leaders on the Boards of both hospitals, who have demonstrated a genuine commitment to serve the Greater Grand Rapids community by using profits to increase health care quality, could be expected to bring accountability to price structuring. *Id.* at 1298. Finally, the court relied heavily on the non-profit status of the hospitals, as well as the fact that hospitals were in the business of saving lives, in reaching its conclusion. *Id.* at 1296.

217. FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996).

substantial financial award/penalties based on group performance in meeting predetermined utilization targets. The Agencies further acknowledge that new types of risk sharing arrangements may develop and encourage networks to take advantage of the Agencies' expedited business review and advisory opinion procedures when evaluating new risk-sharing models. Further, Statement 8 contemplates that physician network joint ventures that do not involve substantial financial risk-sharing, and therefore do not fall within the antitrust safety zone, may nonetheless demonstrate that the venture will produce sufficient efficiencies to avoid antitrust concern.

Statement 9, first issued in September 1994, describes the general antitrust analysis for multiprovider networks. Statement 9 provides that multiprovider networks, comprised of competing providers, that engage in joint pricing will be evaluated under the rule of reason if they share substantial financial risk through capitation, risk withholds, percentage of premium or percentage of revenue payment methodologies, global pricing or substantial financial awards/penalties based on group performance and meeting utilization targets. As with physician networks, the Agencies acknowledge that significant efficiencies may be achieved in some multiprovider networks through agreements by competing providers to share substantial financial risk for services provided through the network.

Statement 9 also acknowledges that multiprovider networks that do not involve sharing of substantial financial risk may be sufficiently integrated to demonstrate sufficient desired efficiencies to avoid per se treatment under the antitrust laws. Finally, this statement contemplates that an agreement between competitors on service allocation or specialization which is "reasonably necessary" for the network to realize significant procompetitive benefits would be subject to the rule of reason analysis.

VIII. LABOR/EMPLOYMENT

A. Administrative Developments: OSHA Issues Workplace Violence Guidelines for Health Care Workers

On March 14, 1996, the Occupational Safety and Health Administration (OSHA) published guidelines for preventing workplace violence in health care and social service workplaces.²¹⁸ The guidelines were published in response to the increasing safety and health hazards presented by recurring violence in health care settings. OSHA has stated that there is an underreporting of violent activities reflecting a lack of institutional reporting policies, employee beliefs that reporting will not benefit them, and employee fears that employers believe assaults and other forms of violence are the result of employee negligence or poor job performance. In order to reduce the risk of workplace violence, OSHA recommends that all health care facilities review the guidelines in conjunction with existing policies.

218. OCCUPATIONAL SAFETY & HEALTH ADMIN., PREVENTING WORKPLACE VIOLENCE IN HEALTH CARE AND SOCIAL SERVICE WORKPLACES, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION GUIDELINES (1996).

In the guidelines, OSHA identifies several risk factors which mandate a review of workplace violence policies and response plans. According to OSHA, the risk of violence in the health care setting has increased due to several factors which include the increased prevalence of handguns and other weapons in hospitals, along with the increased targeting of hospitals, clinics, and pharmacies as sources of drugs. In addition to these concerns, OSHA has also cited the following as contributing factors to the rise in workplace violence: low staffing levels during times of specific increased activity; isolated work with clients during examination or treatment; solo work, often in remote locations; and lack of training of staff in recognizing and managing escalating hostile and abusive behavior.

The voluntary OSHA guidelines are published in order to assist all health care employers in determining what actions can be taken to reduce the risk of workplace violence. The guidelines include policy recommendations and practical suggestions to help prevent and mitigate the effect of workplace violence through the implementation of effective security devices and administrative work practices.

*B. Judicial Decisions: Physician Lease Agreements May
Constitute Employment Relationship*

Recently, a U.S. District Court for the Southern District of Indiana ruled that a physician's landlord/tenant arrangement may constitute an employer/employee relationship for purposes of determining liability under federal employment discrimination laws. In *Mukhtar v. Castleton Service Corp.*,²¹⁹ the court expanded federal employment discrimination laws when they held that a business relationship intended to be one of principal/independent contractor for landlord/tenant will constitute an employer/employee relationship for purposes of federal employment discrimination laws if enough of the indicia of an employment relationship exists.²²⁰ This case mandates a reexamination of all principal/independent contractor and landlord/tenant relationships to examine employment tax liabilities and to avoid coverage by federal and state employment laws.

In *Mukhtar*, the landlord, Castleton Service Corporation (CSC), owned and operated an immediate care facility ("Clinic").²²¹ Several physicians practiced at the Clinic, including the tenant, Dr. Mukhtar. Dr. Mukhtar leased the premises for his "non-exclusive use."²²² He agreed not to alter the Clinic and to use it only as an immediate care facility.

CSC provided and maintained the medical equipment and supplies at the Clinic and provided and paid for all utilities. CSC also staffed the Clinic with nurses and other technical and clerical staff. Although these individuals were

219. 920 F. Supp. 934 (S.D. Ind. 1996).

220. *Id.* at 938.

221. *Id.* at 936.

222. *Id.*

employees of CSC, they were also under the supervision of the tenants and other practicing physicians with regard to all professional duties. CSC indemnified Dr. Mukhtar for any payroll tax obligations for these individuals.

With regard to payment, the contract required CSC to provide all business and management services²²³ and CSC received as rent, a percentage of Dr. Mukhtar's gross annual charges to patients. The amount received by Dr. Mukhtar was treated as "non-employee compensation" for tax purposes and was reported on IRS Form 1099.²²⁴ The IRS audited this lease arrangement and did not object to CSC's failure to withhold employee taxes from these payments.²²⁵

Dr. Mukhtar worked at the Clinic as a licensed physician for several years. After CSC terminated the parties' contractual relationship, Dr. Mukhtar sued CSC for violation of the Age Discrimination and Employment Act (ADEA). CSC contended that it had a landlord/tenant relationship with Dr. Mukhtar rather than an employment relationship. CSC argued that the ADEA, which applies solely to discrimination of employment, did not apply to its relationship with Dr. Mukhtar. The district court disagreed with CSC finding that key elements of an employment relationship existed.

The district court acknowledged that, where a statute's definition of "employee" is not helpful, various factors developed by previous court decisions must be considered when classifying workers as employees.²²⁶ Because varying amounts of weight are placed on these factors, depending on the facts or circumstances of each case, the status of an individual cannot be decided simply because a majority of factors favor one classification over another. Although no one factor is outcome determinative, the district court indicated that all factors can be summarized into one general inquiry: Does the alleged "employer" control the individual performing these services?²²⁷

Given the fact-specific analysis adopted by the district court, "principals" and "landlords" may no longer assume that they are free to terminate contractual relationships of "independent contractor" or "lessee" physicians without the potential of employment discrimination liability. Principals and landlords must now ensure that they do not exercise control over when, where, and how the physicians do their work to such a degree that their arrangement will constitute an employer/employee relationship. If an employment relationship exists, then the termination must be viewed in light of the various State and Federal employment discrimination laws.

CONCLUSION

The Survey period has indeed been an interesting, and in some cases an unsettling one. Increased regulation and enforcement challenge providers seeking

223. *Id.* at 937.

224. *Id.*

225. *Id.*

226. *Id.* at 940.

227. *Id.* at 939.

to deliver services of higher quality with expectations of decreased reimbursement. Agencies such as the Department of Justice and Federal Trade Commission are being forced by judicial decisions to reconfigure previously held principles which benefits providers while the IRS has provided legislation to impose new sanctions against providers and individuals within the health care industry. It is an opportune time for members of the bar to step forward and assist their health care clients in a manner that allows the clients to concentrate on the delivery of a highly valued service which benefits the communities in which the care is provided.

DEVELOPMENTS IN APPELLATE PRACTICE IN 1996

JAMES J. AMMEEN, JR.*

INTRODUCTION

Appellate practice developed on a steady course in 1996. There were no landmark cases¹ or radical rule changes that would substantially alter appellate practice for years to come. The rule changes that went into effect were predominantly aimed at mundane, but jurisdictionally important, issues. The amendments ordered in December 1996 for implementation in 1997 are more dramatic in substance and likely to breed their own litigation. All are discussed in Part I.

Developments in appellate procedure case law sometimes arise from discrete practices in particular appeals, but because appellate courts ordinarily do not elevate procedural issues to the same level as substantive issues in published opinions, this common-law style development actually is rare. Missteps of counsel tend to deprive an appellate court of jurisdiction, which therefore causes an appeal to be dismissed without comment.² Therefore, opinions that discuss elements of appellate practice tend to elucidate principles that underlie the resolution of substantive issues. Part II interprets some of these cases by discussing the interplay of principles and practices of appellate procedure.

Part III highlights events in Indiana's appellate courts in 1996, and Part IV outlines the creation of the Appellate Practice Section in the Indiana State Bar Association. Part V discusses personnel changes on the Indiana Supreme Court, followed by some concluding thoughts.

I. RULE CHANGES

A. Rule Amendments Made Effective in 1996

1. *Appellate Rule 4*.—The 1996 amendment altered section (C) to abolish the requirement that the appellant file a separate assignment of errors in the court of appeals in a direct appeal of an administrative action. This amendment removes an unnecessary formal step required of the appellate practitioner for the court of

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1. *E.g.*, *Rosi v. Business Furniture Corp.*, 615 N.E.2d 431 (Ind. 1993).

2. For example, in 1995 the supreme court was petitioned to grant transfer of 14 appeals that had been dismissed by the court of appeals. In many of these cases, a jurisdictional deadline was missed by just one day. Overall in 1995, the court of appeals ordered 167 dismissals sua sponte, 132 on the appellant's motion, and 79 summary affirmances or dismissals on the appellee's motion out of a total of 7788 dispositions. COURT OF APPEALS OF INDIANA, 1995 ANNUAL REPORT 12 (1996). Dismissals at the court of appeals are difficult to break down with any greater specificity because many result from the parties' settlement.

appeals to acquire jurisdiction in administrative cases, and it confirms the spirit of the final sentence of section (C), which states that it is appropriate in the appellate brief to assert an administrative body's final decision is contrary to law. Ideally, the rule's effect will result in less paper being filed at the court of appeals, thereby improving timeliness and lowering costs to the client for the prosecution of an appeal.

2. *Appellate Rule 7.2.*—The amendment to Appellate Rule 7.2 goes hand-in-hand with the amendment to Appellate Rule 4(C). Appellate Rule 7.2 subsection (A)(1) was amended to delete the requirement that the appellant include an assignment of errors in the record of proceedings in direct administrative appeals.

Appellate Rule 7.2 subsection (A)(3)(a) amended the rules governing the layout, formatting, and typefaces acceptable in producing the record of proceedings.³ The changes are formal, and thus very important, because they are designed to reduce the physical size of the appellate record. Accordingly, margins have been reduced,⁴ typeface made uniform,⁵ and line spacing limited.⁶ Responsibility for complying with the rule naturally is assigned to the attorney who files the record, not to the trial court reporter.

3. *Appellate Rule 8.2.*—Rule 8.2 was the first of four appellate rules dealing with filing and documentary form that were amended twice in the last year. The others were Appellate Rules 9, 11, and 18. The changes are thematically consistent with those of Rules 4 and 7.2 in that their intent is to yield uniformity and brevity to documents submitted to our appellate tribunals. The changes are formal: they address typeface,⁷ page limits, and word counts.⁸

3. IND. APP. R. 7.2(A)(3)(a).

4. Margins must be at least one inch, and all lines of text must begin no more than two inches from the left edge of the page.

5. Typeface is maximized at 12 point type, which is consistent with rules regulating other appellate documents.

6. Lines may no longer be more than double-spaced in the record.

7. The first amendments to Appellate Rules 8.2(A)(1) and 9(A), which went into effect on February 1, 1996, limited typeface to 11 points or characters per inch. The second amendment which became effective January 1, 1997, changed the rule by prohibiting any typeface less than 12 points in both text and footnotes. The court did not mandate use of monospaced typefaces (e.g., Courier or Pica), but did add a reasonableness standard ("read comfortably" to documents employing a proportional typeface (e.g., Times Roman or Arial).

All references to printing have been removed, which literally means that the Clerk may no longer accept handwritten documents. Presumably, in a case of hardship, leave to file non-complying documents will be granted upon petition showing cause.

8. Rule 8.2(A)(4) limits brief lengths to 30 pages or 14,000 words, including headings, footnotes, and quotations. Rule 11(B) limits motions for rehearing and petitions for transfer to three pages or 1400 words, and briefs in support thereof may not exceed nine pages or 4200 words. Finally, Appellate Rule 18, governing appeals from the tax court, limits petitions for review to three pages or 1400 words (section (C)), and preliminary briefs in support of the petition to six pages or 2800 words (subsection (E)(1)). Briefs in tax appeals in which the supreme court has assumed jurisdiction are limited to 30 pages and 14,000 words, with reply briefs limited to 15 pages or 7000

Exceptions to the formal requirements will be granted only upon petition to the court for leave to file a non-compliant brief. The petition must show cause and be timely filed. This rule is not new; the amended rule restates the prior rule. In light of the reduction in page limits and the requirement of verified statements attesting to word counts,⁹ however, the supreme court's clear intent is to tighten up briefing practice by imposing personal demands on appellate lawyers. Accordingly, a petition for leave to file an oversized brief or for an extension of time ought not be filed the day before the brief is due, but instead should be filed well in advance of the deadline to assure the court that a statement of "good cause" is made in good faith.

The supreme court has made a subtle, but dramatic, shift in the way it now considers the form of briefs, by shifting from pure page limits to a combination of page limits, font sizes, and word counts. The court now looks at word limitations in an effort to compensate for technological advancements. Contemporary word processing programs are so powerful that document formatting may be manipulated to effectively circumvent the rules by enabling a lawyer to reformat a long document so that it "fits" within limits established for typewriters. Such conduct borders on sanctionable.¹⁰ It is dishonest, makes a court's work more difficult, and might yield an unfair advantage. The supreme court's inclusion of a word count limitation is a bright-line rule and allows a party to objectively determine the "true length" and compliance of his own and his adversary's document.¹¹

words. IND. APP. R. 18(E)(2).

9. IND. APP. R. 8.2(A)(4)(b). "Any brief submitted which is longer than thirty (30) pages must be accompanied by a verified statement the attorney or unrepresented party responsible for preparing the brief stating the number of words in the brief (exclusive of the App.R. 8.3(A)(1) items) and the method by which the word count was obtained." *Id.*

10. The temptation to sandbag a court is strongest in cases where the stakes are highest. For a brief description of tense, harsh briefing practices in John Gotti's criminal appeal, see Gerald F. Uelmen, *Brief Encounters*, CAL. LAW., Jan. 1994, at 57.

11. Since the second Rule 8.2 amendments went into effect in January 1997, several attorneys have asked questions regarding the procedure of counting words. As a general principle, the supreme court employs a rule or reason in these matters; it is not the court's intent to turn appellate practice into a game of "gotcha" in which appeals are routinely dismissed on technicalities. The court expects attorneys to rely on the word counting features of their word processors to do the counting, hopefully not an attorney or law clerk on the clock.

That said, some ground rules must be stated. Footnotes and blocked-and-indented quotes are not one word, nor are they exempt from counting. Citations may be counted as a single word (e.g., 642 N.E.2d 49 (Ind. 1995)). Party names count individually, but "v." does not count (e.g., "Jones v. State" is two words). "*Id.*" counts, and so do numbers. Finally, captions, cause numbers, service lists, and certificates of service do not count.

Effectively, the responsibility for policing word counts resides with the appellate practitioner. Motions to strike a brief or dismiss an appeal therefore are tools for regulating an adversary's conduct. Insofar as the limitations on the page length established in the rules are set at approximately 65% of the word limitation, certification of word counts is expected to be an

Another important formal change contained in Appellate Rule 8.2 is subsection (B)(1)'s change in case citation form. Cases are now being cited in "Blue Book"¹² form in appellate documents. This change may have had its strongest advocates among the appellate judges' law clerks, but it should appeal to all members of the bar. Now, citation in Hoosier legal documents accords with the national standard, which should streamline research, writing, and cite-checking and make it easier to interface with electronic research resources to ultimately reduce the cost of litigation.

4. *Appellate Rule 8.3*.—Effective February 1, 1996, the amendment to Rule 8.3(A)(4) specified that the statement of the case must indicate briefly the lower court's disposition of *both* the case and the issues presented for review. Again, this is a rule change intended to simplify appellate practice by spotlighting a trial court's judgment and final rulings. Highlighting the lower court's acts allows the appellate court to focus more easily on the appellate remedy under consideration.

Appellate Rule 8.3's amendment also added the requirement in criminal appeals that a copy of the sentencing order be appended *to the brief* in all appeals raising sentencing issues. This rule should be a welcome relief to defendants whose sentences should be reduced due to a sentencing error because it enables appellate courts to shorten the time litigation takes. No longer will an appellate court have to wait while it remands the case to the trial court for the preparation of a written sentencing order to include in the record of proceedings.¹³ It is simply amazing that sixteen years after *Judy v. State*,¹⁴ the supreme court still remands cases to trial courts because the record does not contain a written sentencing order to review. It is not the responsibility of the appellate court to ensure that the record has a copy of the sentencing order; that responsibility lies with the appellant's attorney. How can an appellate attorney prepare an effective brief or intelligently argue sentencing error without reviewing a certified statement of the sentence? The question boggles the mind, and the amendment to Appellate Rule 8.3 should assure that it never be asked again. Now, failure to include a copy of the sentencing order in the brief deprives the appellate court of jurisdiction and may result in waiver of meritorious claims. Aside from the constitutional ramifications of this default, ethical sanctions may now await the appellate lawyer who fails to include the sentencing order in the brief (and, thus, in the appellate record, too).

5. *Appellate Rule 11(B)*.—The rule was amended twice in 1996, with the first amendment, effective February 1, 1996, substantively liberalizing a party's procedural options when making strategic appellate decisions after suffering an

ordinary part of appellate practice and should provide a benchmark by which to judge an adversary's behavior.

12. HARVARD L. REV. ET AL., *THE BLUEBOOK A UNIFORM SYSTEM OF CITATION* (16th ed. 1996).

13. Of course, this rule has an impact on trial practice because it is now incumbent on the attorneys to make sure that the trial court reduces its sentencing determination to writing before certifying a judgment as final.

14. 416 N.E.2d 95, 108 (Ind. 1980).

adverse ruling in a trial court. (The second amendment, effective since January 1, 1997, concerns only the form of petitions and briefs.¹⁵) Since February 1, 1996, a party may raise in its petition for transfer to the supreme court any issue properly preserved for appeal. This change removes the former restriction that limited the justiciability of issues on transfer to those raised in a petition for rehearing in the court of appeals. This modification enables the parties to focus the court of appeals on specific allegations of error, which should speed the work of both lawyers and the court in disposing of petitions for rehearing.

The old rule had the effect of channeling the issues brought to the supreme court, which should have fostered promptness in the resolution of appeals as a theoretical matter. By deciding fewer appellate error claims in transfers from rehearings, the supreme court should have been able to adjudicate cases more quickly. This would benefit some litigants, but not all, because the court frequently found itself remanding cases to the court of appeals for resolution consistent with its order.¹⁶ This would approximate the U.S. Supreme Court's practice with respect to writs of certiorari, which negates the advantages of transfer. Worse, it could allow some parties to avoid execution of judgment or to wear down an adversary by extending litigation ad infinitum.¹⁷ To prevent this, under the old rule, the court would exercise the full extent of its jurisdiction and decide an appeal fully on the merits. Sometimes, this practice led to a party being "blind-sided" by the court's judgment.¹⁸

The rule change thus clarifies the jurisdiction of the supreme court on transfer. As it has been explained in this space in prior years, when the court grants transfer, it takes jurisdiction over the entire case and vacates the decision of the court of appeals.¹⁹ Vacatur of that decision thus lays open the entire appeal, and this rule change concerning transfer after rehearing reinforces the supreme court's jurisdiction over the matter. A party is not restricted on transfer from arguing any

15. IND. APP. R. 11(B) (introductory paragraph); IND. APP. R. 11(B)(6). *See supra* note 6.

16. Conceivably, the former rule could work unfairness by depriving the appellant of the opportunity to challenge reversible errors which had otherwise been preserved. For example, the appellant claims errors that are not addressed in the court of appeals because it found one issue to be dispositive. Rehearing is devoted to the appellee's exception to that judgment, and, on transfer, the supreme court decides in favor of the appellee, reversing on the one rehearing issue. Unless the supreme court remands, this result leaves the other errors which appellant had properly preserved and submitted to the court of appeals without review on the merits. The supreme court has two options to prevent this result: one, decide all issues on the merits, or two, decide the one issue and remand to the court of appeals for resolution of the undecided issues. In the past, the court has employed both approaches.

17. After the court of appeals adjudicated a case a second time, another petition for transfer would likely demand the attention of the supreme court. Appellate practice in this manner could unfairly tip the playing field by favoring the financially well-endowed litigant over a weaker one who lacks the resources to defend a just, but complex, claim.

18. *See, e.g., Savage v. State*, 655 N.E.2d 1223 (Ind. 1995).

19. George T. Patton, Jr., *Recent Development in Appellate Practice: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105 (1992).

allegation of error that it properly presented to the court of appeals.

Indiana's constitution was drafted in a period of intense populism, and the spirit of populism still pervades much of Hoosier life. Consistent with this philosophy, the jurisdiction of the Indiana Supreme Court is constituted so that the court does not sit in an "ivory tower" dedicated to advising "lower courts." Rather, the supreme court resolves lawsuits. When the court grants transfer, the record briefs, motions, petitions, and other documents are legally transferred for final adjudication on the merits.²⁰ The court's transfer jurisdiction, though discretionary, affirms this power and responsibility by removing from the rule any semblance of issue channeling.

6. *General Remarks Concerning the 1996 Rules Changes.*—The majority of amendments to Indiana's appellate procedure were not substantive in a legal sense, but instead tweaked the forms of appellate filings. The result of these changes will simplify practice for the appellate bar and the appellate courts. Most important to citizens awaiting an end to litigation, a shorter wait for final judgments should result. Ideally, the formal changes also help to assure just results by leveling a playing field that can be tilted by disparities in resources, technological competence, and support.

The substantive change to Appellate Rule 11(B) that liberalized the scope of issues that can be argued in the supreme court after a rehearing in the court of appeals is a reaffirmation of the court's jurisdiction. In another important sense, it eliminates jurisdictional confusion in appellate practice caused by the supreme court's varying approach to transfers from rehearing when it sometimes decided only narrow, channeled issues or other times resolved all issues on the merits. Accordingly, the 1996 amendment to the Appellate Rules was a necessary step in clarifying supreme court practice on transfer.

B. Internal Administrative Rules Implemented in 1996

In 1996, Indiana Supreme Court and Indiana Court of Appeals implemented internal rules that have immediately improved the Hoosier bar's appellate practice.

The first and most important internal procedural change was foreshadowed by Chief Justice Shepard in the State of the Judiciary Address.²¹ Chief Justice Shepard announced that appeals involving the lives or rights of children would be specially noticed by the clerk, "moved to the top of the stack," and given expedited review by the court of appeals and the supreme court. The court of appeals has made a great impact in the adjudication of custody, CHINS,²² and other cases involving children's interests, shortening to less than two months the length of time which children's lives are in limbo while an appeal is pending. The court has done this by not granting extensions of time in such cases and by imposing strict

20. Of course, the court still remands cases for resolution of factual issues.

21. Randall T. Shepard, *State of the Judiciary: The Challenge of a Challenged Profession*, Address to the General Assembly and Governor (Jan. 17, 1996), in *RES GESTAE*, Feb. 1996, at 30:34-35.

22. "Child in need of services."

internal deadlines for issuing its decisions.²³

The court of appeals has instituted an internal rule that should prevent the confusion that has sometimes arisen when a publication order has been entered for one of its opinions after the supreme court has denied transfer. Henceforth,

[N]o memorandum opinion (of the Court of Appeals) will be published after transfer has been denied or after the time to request transfer has expired and no request for transfer has been made. In the event that a case is pending on transfer when a petition for publication is received, the Supreme Court shall be notified that there is a possibility that the memorandum decision will be published.²⁴

Winning parties or, more likely, their attorneys, often wish to have their victories memorialized in the North Eastern Reporter. No longer can one wait, however, until all the dust settles to make a motion for publication. It bears repeating: the supreme court's denial of transfer is not necessarily a stamp of approval. Admittedly, it means something, but what it means is not revealed. Transfer is denied for a variety of reasons, most often because the court of appeals is correct. Transfer may be denied, however, if a jurisdictional condition precedent was not satisfied or for some other reason. Thus, when a motion to publish a memorandum decision is not made prior to the expiration of the time in which the supreme court can exercise jurisdiction over the appeal, the opportunity is waived.²⁵

C. Brief Remarks About the 1997 Rule Amendments

On December 23, 1996, the supreme court issued orders amending Indiana Appellate Rules 7.1, 15, 16, 17.

Indiana Appellate Rule 7.1 was amended, effective March 1, 1997, to permit the filing of the transcript of the evidence in an electronic format.²⁶ This is a remarkable technological step, one which the court has tested with successful results in three counties. As first promulgated, electronic submission of the record will only apply to the transcript of the evidence and proceedings,²⁷ but not the praecipe and "papers."²⁸ The Division of State Court Administration shall henceforth/has published technical standards to govern the electronic filings.²⁹

23. See John T. Sharpnack & James S. Kirsch, *Advancing the Interests of Children in Appellate Practice*, RES GESTAE, Mar. 1996, at 11.

24. Memorandum from John T. Sharpnack, Chief Judge, Indiana Court of Appeals, to Supreme Court of Indiana 1 (Apr. 3, 1996).

25. See *Mercantile Store Co. v. Swiger*, 673 N.E.2d 543 (Ind. Ct. App. 1996) (motion to publish denied by order Jan. 23, 1997).

26. IND. APP. R. 7.1(D).

27. IND. APP. R. 7.2(A)(3) (1996).

28. IND. APP. R. 7.2(A)(1, 2) (1996).

29. As of this Article's publication, the standards have not been issued.

*Marshall v. Reeves*³⁰ has been overruled in part by the amendment to Indiana Appellate Rule 15. The new rule now allows for the recovery of costs by the appellee when a judgment is affirmed in whole, and for recovery of both trial and appellate costs by the appellant when a judgment is reversed in whole.³¹ Costs *shall* include the transfer fee whenever a party prevails in whole on transfer.³² Included in the calculation of costs are the costs of record procurement, service, praecipe, and the transfer fee (when appropriate).³³ The rule does not indicate whether a denial of transfer will be treated as an affirmance, and such an outcome is unlikely. Nonetheless, litigants considering appealing an unsatisfactory decision must pause to objectively weigh its merits before filing an appeal or petitioning for transfer because the monetary risk attached with losing will be magnified. Whether or not the practical effect of this amendment has a chilling effect on appellate filings will be one of the more interesting developments in appellate practice in 1997.

The amendment to Indiana Appellate Rule 16 imposes on the trial court the obligation to certify its summary findings of fact and conclusions of law with the other required submissions when an appeal is taken in a proceeding to determine whether the consent of a minor's parents for the minor to receive an abortion shall be waived.³⁴ Otherwise, the amendment is not substantive, but merely a reflection of the recodification of Indiana's statute concerning the waiver of parental consent to a minor's abortion.³⁵

A substantive amendment made to Appellate Rule 17 has the potential for tremendous impact in criminal appeals. The amendment eliminated the "no reasonable person" standard of review contained in subsection (2) of the old rule.³⁶ This gives the court of appeals and the supreme court wide latitude in the determination of "manifest unreasonableness." Accordingly, the moral and legal considerations that shape the meaning of "manifest unreasonableness" will be determined in the common law way: by the work of Indiana's appellate courts. This should prove to be a significant change to current criminal appellate practice.

In sum, the 1997 amendments portend an exciting year in appellate practice. The new amendments significantly alter the landscape in both civil and criminal appellate practice with the electronic filing of the transcript, the collection of appellate costs for "complete" judgments, and the elimination of "no reasonable person" standard, in sentencing review.

30. 316 N.E.2d 828 (Ind. 1974).

31. IND. APP. R. 15(H).

32. *See id.*

33. *See id.*

34. IND. APP. R. 16.

35. IND. CODE § 16-34-2-4 (1993).

36. IND. APP. R. 17. The deleted subsection (2) read, "A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

II. CASES ADDRESSING APPELLATE PROCEDURAL ISSUES

A. Appellate Jurisdiction

1. *Rulemaking and Jurisdiction.*—A fundamental understanding of the separation of powers doctrine in constitutional law³⁷ is that the supreme court can neither enlarge nor reduce its jurisdiction; its jurisdiction is set out in the constitution. A jealously guarded aspect of the court's jurisdiction is its rulemaking power.³⁸ Indiana's constitution requires the court to prescribe rules by which its jurisdiction can be invoked and "to supervis[e] the exercise of jurisdiction by the other courts of the State."³⁹ Most specifically, the constitution commands the supreme court to promulgate rules specifying both the court of appeals' appellate jurisdiction and its original jurisdiction in administrative cases.⁴⁰ Accordingly, the court of appeals held in an administrative appeal, *Sneed v. Associated Group Insurance*,⁴¹ that litigants must adhere to the procedures established in the appellate rules to invoke its jurisdiction because the rules take precedence over conflicting statutory procedures.⁴²

The *Sneed* court reasoned that the supreme court acted on this principle when it amended Appellate Rules 4(C) and 7.2(A)(1) to eliminate the requirement of filing an assignment of errors in the court of appeals.⁴³ As a result, the court concluded that the supreme court "disapproved" of its holding in *Sheets v. Disabilities Services, Inc.*⁴⁴ even if it did not specifically overrule it. Rule 4(C) outlines the court of appeals' original jurisdiction in administrative cases and the addition in this rule of a specific statement that eliminated the requirement of filing an assignment of errors addresses the method by which a party invokes the court's jurisdiction. The amendment removed the barrier faced by the appellant in *Sheets*,⁴⁵ and thus enabled the court of appeals to exercise jurisdiction even though the appellant did not file an assignment of error.

The court of appeals also wrestled with another interesting issue in *Sneed*, namely whether to give the amendment to rule 4(C) retroactive effect. The court noted that there is not a hard and fast rule concerning the application of new rules to cases already on appeal. Rather, the court gleaned from its review of civil case law that a pragmatic approach "focusing upon notions of fairness and equity" has evolved.⁴⁶ Finding the amendment to rule 4(C) ameliorative, it extended the rule

37. See IND. CONST. art. III, § 1.

38. See *id.* art. VII, § 4.

39. *Id.*

40. *Id.* § 6.

41. 663 N.E.2d 789 (Ind. Ct. App. 1996).

42. *Id.* at 794.

43. See *supra* Part I (1) and (2).

44. 602 N.E.2d 506 (Ind. 1992)

45. *Id.* at 507.

46. *Sneed*, 663 N.E.2d at 796.

to *Sneed* and entertained the appeal on the merits.⁴⁷

2. *Interlocutory and Final Orders*.—A denial of summary judgment is not a final, appealable order.⁴⁸ It is interlocutory in nature because denial of the motion does not decide any material issues.⁴⁹ When a motion for summary judgment is denied, the case is set for trial and proceeds accordingly. The trial court possesses plenary jurisdiction over the case, and appeal from the motion's denial may be taken only as a matter of grace.⁵⁰ The trial court is not obligated to certify the issue for interlocutory appeal, and its refusal to do so will be reviewed only for an abuse of discretion.⁵¹ To win on a claim that the trial judge abused her discretion by not certifying the issue for interlocutory appeal, the appellant most likely will have to show that he was entitled to relief on the merits in order to show prejudice. This makes sense because the movant is appealing a negative judgment. Of course, a party may appeal the denial of summary judgment and receive de novo review on the merits after final judgment is entered.⁵²

A mistrial ordered after a jury has returned its verdict is a final, appealable order.⁵³ This result ensues because the jury has done its job and found the facts, presumably without the process having been infected. A party therefore is entitled to judgment because the verdict essentially completes the trial. The court's declaration of mistrial operates in lieu of a final order of judgment and thereby approximates a Trial Rule 60(B)(5) order granting relief. Thus, the mistrial judgment itself becomes the court's final order in the case. This situation contrasts with a mistrial declared before verdict, which does not terminate the trial court's jurisdiction over the case. This contrasts with the federal practice in which the trial court retains jurisdiction over the matter after declaring a mistrial post-judgment.⁵⁴

3. *Settlement and Transfer*.—The supreme court's grant of transfer is a plenary exercise of jurisdiction. Accordingly, the litigants' settlement of their lawsuit after transfer does not alter the court's jurisdiction. The court's dismissal of an appeal upon settlement is a proper exercise of its discretion, and the dismissal has no effect on transfer's vacatur of the court of appeals decision.⁵⁵ The court usually will not continue its jurisdiction simply for the exercise of writing an advisory opinion, which sometimes results in publication of a court of appeals' opinion that is not law, and which should not be cited as authority, underscoring

47. *Id.* at 797.

48. *See Keith v. Mendus*, 661 N.E.2d 26 (Ind. Ct. App. 1996), *trans. denied*.

49. *See In re J.L.V., Jr.*, 667 N.E.2d 186 (Ind. Ct. App. 1996) (final judgment disposes subject matter of litigation to the extent that the court has jurisdiction over it).

50. *See Dukes v. State*, 661 N.E.2d 1263 (Ind. Ct. App. 1996).

51. *See Keith*, 661 N.E.2d at 26; *Hollingsworth v. Key Benefit Adm'rs, Inc.*, 658 N.E.2d 653 (Ind. Ct. App. 1995), *trans. denied*.

52. *See id.*

53. *See Ward v. St. Mary Medical Ctr.*, 658 N.E.2d 893 (Ind. 1995).

54. *See, e.g., Bethel v. McAllister Bros.*, 81 F.3d 376, 382 (3d Cir. 1996); *Arenson v. Southern Univ. Law Cent.*, 963 F.2d 88, 89 (5th Cir. 1992).

55. *See Meyer v. Biedron*, 667 N.E.2d 752, 752-53 (Ind. 1996) (*per curiam*).

the importance of closely scrutinizing one's authority in briefing practice.⁵⁶

The effect of this result on the litigants can be problematic. In *Meyer v. Biedron*, an appeal that grew out of a transaction involving several parties and several lawsuits. Subsequent to the court of appeals decision in this case,⁵⁷ summary judgment was entered in other related cases. After the supreme court dismissed the appeal, the plaintiff-appellant petitioned the court to issue an opinion because the negative judgments in related cases were grounded in the vacated court of appeals holding. The court declined. The plaintiff must therefore attack each of the adverse judgments either by seeking relief from judgment or via appeal.

Sound jurisprudential reasons undergird the court's decision not to render an advisory opinion. There are many reasons the supreme court may accept transfer of a case from the court of appeals, some of which may not be for the purpose of reversing the court of appeals' decision. The petitioner assumes too much if he or she believes transfer was granted because the supreme court agrees with the specific points he or she deems erroneous in their petition for transfer. Additionally, what the petitioner here seeks with an opinion by the supreme court is a tool, essentially a kind of "offensive collateral estoppel" weapon, to be used against other adversaries. This hardly seems fair to those parties, who are unrepresented in the appeal and whose interests may not be adequately represented in the settlement (if at all)—especially when the appellant has other procedural avenues for seeking relief. Finally, transfer is not a writ of certiorari. The court does not answer discrete questions of law in order to advise and direct lower courts, but rather to bring disputes to final resolution. Unless the question is one of great public import,⁵⁸ the court will not issue opinions as an exercise of abstract

56. This result happened with *Old Town Development v. Langford*, 349 N.E.2d 744 (Ind. App. 1976), *trans. granted*, 369 N.E.2d 404 (Ind. 1977) (appeal dismissed upon parties' settlement). *Cf. L.W. v. Western Golf Ass'n*, 675 N.E.2d 760, 762 n.2 (Ind. Ct. App. 1997) (citing vacated case not as authority, but as "reflective of current state of the law, as drawn from authorities cited therein.")

Unfortunately, the publication of a vacated opinion may lead to substantial confusion. The Indiana Appellate Court Reports, the official reporter of the Indiana Court of Appeals in 1976, never published *Langford*, which underscored the fact that its holding (that there is an implied warranty of habitability in residential leaseholds) did not become part of the Indiana common law. However, this case has been cited as good law in the appellate courts of more than a dozen states and three federal circuit courts of appeal, and *Shepard's Indiana Citations* and the *American Law Reports* series indicate that it is good law in Indiana. *Langford's* holding is not law, and no court nor commentator should recognize it as such.

57. 647 N.E.2d 1153 (Ind. Ct. App. 1995), *vacated*, 667 N.E.2d 752 (Ind. 1996).

58. *See, e.g., In re Lawrance*, 579 N.E.2d 32 (Ind. 1991) (elucidation of decisional framework for resolving question of whether to continue life support for person in persistent vegetative state handed down after death of named party). The court of appeals employs the same basic standard. *See City of Evansville v. Zerkelbach*, 662 N.E.2d 651, 653 (Ind. Ct. App. 1996), *trans. denied* (minimum age for appointment to police force a "question of great public importance which is likely to recur").

analysis.

4. *Dispositive Procedural Matters.*—

a. *Record of proceedings.*—Naturally, the filing of a record of proceedings is jurisdictional in appellate practice—without it, there is nothing for the court to review. As basic as this sounds, each year yields cases where the form or filing of a record is itself litigated on appeal.

The appellate rules require the appellant to file just the parts of the record that are necessary to review the issues it identifies for appeal.⁵⁹ Generally, the record must contain a transcript of the evidence for it to be sufficient to sustain appellate jurisdiction, and failure to submit a transcript of the evidence waives any claims of error founded on evidentiary issues.⁶⁰ This result follows as matter of course from the longstanding rule that matters outside the record will not be considered on appeal.⁶¹ An appeal taken from a motion to dismiss, however, does not require inclusion of a transcript of the evidence for the record to be sufficient for appellate review.⁶² Indeed, evidence has not been admitted at this stage of litigation, so a sufficient record in an appeal from a motion to dismiss, whether from a final or interlocutory order, requires submission of just the pleadings, motions, and memoranda material to the validity of the plaintiff's claim and the trial court's jurisdiction.

When the record submitted by the appellant is incomplete, the appellee faces several options. First, the appellee may move to dismiss the appeal on the ground that the appellate court is not possessed of jurisdiction because there was no error presented for review. Second, he or she could point out the deficiency to the appellate court, which could then order to appellant to supplement the record.⁶³ Finally, the appellee could file a praecipe in the trial court, construct a supplemental record, and submit it to the appellate court. In the latter case, the appellate court may tax the costs of supplemental record preparation to the appellant.⁶⁴ Of course in a cross-appeal, these remedies are of little moment because the appellee/cross-appellant bears the burden of ensuring the submission of a proper record in their appeal.

Barriers to the construction of an adequate record shall not deprive a party of his constitutional right to one appeal.⁶⁵ Accordingly, the court of appeals vacated a support decree and remanded for a new hearing in a marital dissolution case

59. See *In re Walker*, 665 N.E.2d 586, 588 (Ind. 1996) (citing with approval *Jackson v. Duckworth*, 79 F.3d 1150 (7th Cir. 1996)).

60. See *id.* (citing *Campbell v. Criterion Group*, 605 N.E.2d 150, 160 (Ind. 1992)).

61. See *Shafer v. Lambie*, 667 N.E.2d 226, 231 n.5 (Ind. Ct. App. 1996).

62. See *Ziobron v. Crawford*, 667 N.E.2d 202, 205 (Ind. Ct. App. 1996), *trans. denied*. This fact pattern could arise only in a case where some claims are dismissed and others are tried. In a "pure" dismissal, no evidence was taken because the trial court ordered judgment grounded only on the pleadings.

63. See *Owensby v. Lepper*, 666 N.E.2d 1251, 1257 (Ind. Ct. App. 1996).

64. See *id.* This is may be especially likely now in cases where the appellate court grants a "complete" affirmance. See *supra* discussion Part I.C.

65. See IND. CONST. art VII, § 6; *Campbell v. Criterion Group*, 605 N.E.2d 150 (Ind. 1992).

which the appellant demonstrated he or she could not reconstruct the record because a transcript was not made in the trial court and the trial judge had died while the appeal was pending.⁶⁶ The court based its decision on principles of due process to determine that it would be inequitable to deny a party their “absolute right” to one appeal because the party could not reconstruct the record. The court reached this decision despite the fact that all the evidence was stipulated, the hearing in question was essentially an oral argument to the trial court, and the parties agreed not to make a transcript of the hearing in order to save money.⁶⁷ It is likely that the deciding factor was the trial judge’s death, which created a hardship over which the appellant had no control. The important lesson of this case is its reminder of the constitutional underpinnings of rules of procedure. As the supreme court made clear in *Campbell v. Criterion*,⁶⁸ procedural rules that work a jurisdictional bar when a party cannot produce a record due to occurrences beyond his control will not deprive the party of the fundamental right to seek a just remedy.

b. Briefing matters (literally and figuratively).—In the same way that filing a record is a jurisdictional matter for the appellant, appellate briefs also have a jurisdictional character. To the appellee, the same cannot be said. Rather, the appellee is not required to file a brief. Failure to do so usually results in a reversal of the appellee’s victory in the trial court, however, because failure to file a brief invites a low standard of review: the prima facie error rule.

The prima facie error rule allows an appellate court to reverse on a just a prima facie showing of error in the appellant’s brief.⁶⁹ The rule protects the appellate court by relieving it of the burden of conceiving appellee’s opposing arguments.⁷⁰ The prima facie error rule also has an obvious due process interest in maintaining the neutrality of the court, but it does not require reversal.⁷¹ The appellate court may instead exercise discretion in deciding whether to look deeper than the face⁷² of appellant’s argument and adjudicate the appeal on the merits.⁷³

Briefing issues which merited attention in published opinions oftentimes reminded appellate lawyers of legal writing fundamentals. For example, presentation of questions for review must be supported by cogent argument and citations to authority,⁷⁴ and failure to cite authority waives any allegations of

66. See *Flores v. Flores*, 658 N.E.2d 95, 96 (Ind. Ct. App. 1995).

67. See *id.* at 98 (Sullivan, J., dissenting).

68. 605 N.E.2d 150 (Ind. 1992).

69. See *Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 980 (Ind. Ct. App. 1996).

70. See *Sills v. Irelan*, 663 N.E.2d 1210, 1213 (Ind. Ct. App. 1996).

71. See *Russell v. Russell*, 666 N.E.2d 943, 948 (Ind. Ct. App. 1996), *vacated*, No. 49S04-9611-CV-705, 1997 WL 356940 (Ind. June 30, 1997).

72. Prima facie error is “error appearing at first sight, on first appearance, or on the face of the argument.” *In re Holley*, 659 N.E.2d 581, 583 (Ind. Ct. App. 1995), *trans. denied*.

73. See *Sills*, 663 N.E.2d at 1213; *Russell*, 666 N.E.2d at 948.

74. See *Judge v. State*, 659 N.E.2d 608, 612 (Ind. Ct. App. 1996).

error.⁷⁵ Naturally, every appeal rises or falls on the prejudice to substantial rights owing to an alleged error; a party's argument therefore must explain the legal merits of its position with respect to particular facts and circumstances in the litigation. Accordingly, parties are not entitled to incorporate by reference the contents of briefs from other appeals, even when appeals concern same transaction or nexus of operative facts.⁷⁶ To allow such short-cutting would excuse an appellant from explaining how he or she was prejudiced by a trial court's alleged error.

An appellate litigant must devote herself to crafting sound, logical, legal argument when briefing an appeal. The best appellate practitioners do this from the beginning of the appellate process, not just when petitioning the supreme court to take transfer of the case. The appellate brief is what the supreme court reads once it takes jurisdiction. Substantive legal argument on the appeal's merits thus is made in the appellate brief, not a reply brief or petition for transfer. Reply briefs are for rebuttal; new theories may not be presented.⁷⁷

Likewise, a petition to transfer is not for "rebriefing." Instead, it is used for stating grounds for vacating the judgment of the court of appeals.⁷⁸ A supporting brief is not required to invoke the supreme court's jurisdiction,⁷⁹ so a brief supporting a petition for transfer must argue why it is legally important for the supreme court to hear the case. It is not a platform for re-argument of an appeal's merits, but a stage for policy discussion of a holding's precedential effect on the rule of law, likely unintended consequences of the court of appeals' holding, or other broad jurisprudential concerns. Narrowly focusing and drafting a petition or brief is undoubtedly a difficult task, but the rules' shortened petition and brief lengths raise concise, cogent argument to yet a higher premium.

B. Standards of Review

1. General Principles.—The baseline of due process and thus all rules of procedure is the integrity of the truth-seeking process. The rules are structured to ensure that the parties will receive a fair hearing and the court can correctly apply the law. Rules of evidence are designed to permit the admission of only relevant, material, and trustworthy evidence, and the rules of trial procedure are designed to identify the material legal issues, to structure the presentation of evidence, and to ensure that parties deal fairly with each other and the court. Cases generally are not generally won appeal—they are won at trial.

The duty of a trial judge is to ensure that the balance weighs true, which involves applying the law of evidence and the rules of procedure so that the process is fair. Trial judges typically are well-schooled and intellectually curious about the law, and their rulings are usually correct. Many stages comprise a trial,

75. See *Quick v. State*, 660 N.E.2d 598 (Ind. Ct. App. 1996).

76. See *Johnson v. State*, 659 N.E.2d 194, 201 (Ind. Ct. App. 1995).

77. See *Alexander v. Dowell*, 669 N.E.2d 436, 441 (Ind. Ct. App. 1996).

78. See IND. APP. R. 11(B)(1).

79. See IND. APP. R. 11(B)(6).

and, when a trial judge actually errs, errors often is more formal than substantive. That is, errors tend not to be so significant as to deny a party a fair trial. For this reason, *inter alia*, trial courts are accorded substantial deference, especially in issues relating to a judge's discretion to admit or to weigh evidence.

An appeal is thus a forum for a litigant to challenge the trial court's application of the law. The burden an appellant carries is to demonstrate that he or she was denied a fair hearing in the trial court (or administrative agency) because of an incorrect understanding or application of law. Essentially, the appellant must show one of two things: 1) that the substantive law entitled the party, not the adversary, to judgment on facts properly found;⁸⁰ 2) or that the truth-seeking process was infected by erroneous application of the law of evidence or procedural rules. This explanation may oversimplify the appellate process somewhat, but appeals are not a forum for challenging the court's interpretation of evidence, however.⁸¹ Many attorneys forget this principle when bringing an appeal. Standards of review thus illuminate whether the trial court indeed erred and whether an error denied the appellant a fair hearing. Generally, unless one of the two propositions described here are demonstrated, an appellate court will affirm a trial court's judgment.

2. *Administrative Appeals*.—The supreme court reaffirmed the longstanding principle that appellate courts do not substitute their judgment for that of an administrative body when adjudicating challenges to administrative acts.⁸² Rather, appellate courts review the propriety of administrative decisions in view of the legislative grant of authority; it does not reweigh evidence or question credibility. Thus, appeals can raise five issues: whether the administrative body (1) had jurisdiction to take action, (2) complied with statutory procedure, (3) based its action on substantial evidence, (4) acted in an arbitrary and capricious manner, and (5) violated constitutional, statutory, or legal principles.⁸³ Consequently, the standard of review in administrative appeals remains quite deferential.

3. *Damages Awards*.—Trial courts are accorded substantial deference in challenges to both general judgments and judgments detailed by findings of fact and conclusions of law.⁸⁴ An award of damages thus receives deference because

80. For example, interpretation of a statute is a question of substantive law and thus reviewed *de novo*, that is, without deference to the trial court because facts are not at issue.

81. Challenges to the sufficiency of evidence naturally involve appellate consideration of evidence, but with substantial deference to the trial court that presided over its presentation. Likewise, challenges to "weighing" issues in criminal sentencing also involve evidentiary consideration, but with substantial deference to the trial court. The reason for deferring to the trial court is simple: an appellate court cannot effectively judge the credibility of witnesses or evidence in a paper record, but a trial court, which observes witnesses and exhibits, is better situated to make a well-founded credibility judgment.

82. See *Rynerson v. City of Franklin*, 669 N.E.2d 964, 972 (Ind. 1996).

83. See *id.* at 971.

84. See *Tri-Profl Realty, Inc. v. Hillenberg*, 669 N.E.2d 1064, 1067 (Ind. Ct. App. 1996), *trans. denied* (two-tier standard of review employed when special findings are requested: 1) whether the evidence supports the findings and 2) whether the findings support the judgment.);

it is precisely the type of issue that involves the weighing of evidence and credibility of witnesses, without regard to whether the fact-finder is a judge or jury. An appellate court therefore reviews whether an award of damages is "so outrageous as to indicate the jury was motivated by passion, prejudice, partiality, or the consideration of improper evidence."⁸⁵ The court may also consider the instructions given a jury when considering whether the jury acted improperly.⁸⁶

Punitive damages by their very nature involve a high standard of proof in the trial court, but the standard of review on appeal for an award of punitive damages is essentially the same as in any challenge to an award of damages. The supreme court reiterated that the proper standard is whether the probative evidence and reasonable inferences therefrom, without weighing evidence or judging witness credibility, allow a reasonable factfinder to find the material facts by the requisite standard of proof.⁸⁷ In essence, this standard of review follows a basic sufficiency of the evidence pattern.⁸⁸

C. Summary Judgment

Review of a summary judgment contrasts with review of a case decided by fully litigated fact-finding because an appellate court stands in the shoes of a trial court when reviewing a summary judgment, and thus owes no deference to the trial court.⁸⁹ There are some simple reasons underlying the *de novo* standard. Witness credibility is not an issue at the summary judgment stage of litigation, and therefore an appellate court does not interfere with the trial court with respect to the determination of genuine issues of fact. All issues are essentially legal: the court identifies the material legal issues in the case and then whether the evidence the parties intend to submit raises genuine issues of fact material to deciding those issues. If there is not an issue of fact necessitating a trial, an appellate court construes and applies the law to determine which party is entitled to judgment. Accordingly, the reviewing court may find the trial court's conclusions helpful,

Brokaw v. Roe, 669 N.E.2d 1039 (Ind. Ct. App. 1996), *trans. denied* (general judgment may be affirmed on any theory supported by evidence); Scott v. Scott, 668 N.E.2d 691, 695 (Ind. Ct. App. 1996) (trial court judgment must be affirmed unless evidence points incontrovertibly to an opposite conclusion).

85. Landis v. Landis, 664 N.E.2d 754, 757 (Ind. Ct. App. 1996), *trans. denied*.

86. See *id.*

87. Budget Car Sales v. Stott, 662 N.E.2d 638, 639 (Ind. 1996) (Punitive damages standard is "whether, considering only the probative evidence and the reasonable inferences supporting it, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find by clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness which was not the mistake of law or fact, honest error of judgment, overzealousness, mere negligence, or other human failing.").

88. See, e.g., Humbert v. Smith, 655 N.E.2d 602, 605 (Ind. Ct. App. 1995), *aff'd*, 664 N.E.2d 356 (Ind. 1996).

89. See Strodman v. Integrity Builders, Inc., 668 N.E.2d 279, 281 (Ind. Ct. App. 1996), *trans. denied*; Spears v. Blackwell, 666 N.E.2d 974, 976 (Ind. Ct. App. 1996), *trans. denied*.

but it owes no deference to the trial court.⁹⁰

D. Costs and Sanctions

Although the 1997 amendment to Appellate Rule 15 alters the landscape and will likely breed its own body of caselaw, recent cases have embodied important principles underlying an appellate court's decision whether to shift fees, to award costs, or to sanction an appellate lawyer.

Bank fees assessed for an appeal bond to secure a stay of proceedings to execute a judgment pending appeal of the underlying claim are not compensable to the prevailing party.⁹¹ The basic reason is that the taxing of costs is not a matter of common law, but of statute, and there is not a statute authorizing an appeal, or supersedeas, bond as a "cost" of litigation. Indiana formerly had such a statute, but it was repealed in 1984.⁹² Moreover, the Appellate Rules establish that an appeal bond shall not be a condition precedent "to perfect an appeal."⁹³ Thus, when the appellant's choice of staying proceedings and its choice of security are matters of convenience, a trial court has no discretion to tax such fees as costs.

Generally, appellate sanctions are permissive, so appellate courts require a showing of bad faith before awarding sanctions on appeal.⁹⁴ As our constitution recognizes an absolute right to one appeal, the court of appeals uses "extreme restraint" when deciding to award appellate sanctions.⁹⁵ Bad faith may be shown by the lawyer's disregard of the appellate rules and omission or misstatement of facts,⁹⁶ that is, arguments must be devoid of plausibility and should indicate intentions to harass the appellee or to delay the litigation.⁹⁷

E. Conclusion

If a single theme can be discerned from the cases discussing appellate procedure in 1996, it may be one of clarification and retrenchment. The court of appeals showed a willingness to give the rules a flexible application in order to reach the merits in *Sneed v. Associated Group Insurance*,⁹⁸ but it did so by relying on the supreme court's inflexible constitutional authority to promulgate rules of procedure. In this way, the court provided a guide to litigants faced with statutory rules which conflict with court rules, and contour was added to the landscape of justiciable orders with respect to motions for summary judgment and mistrial. The

90. See *Strodtman*, 668 N.E.2d at 282.

91. See *AgMax, Inc. v. Countrymark Co-op., Inc.*, 661 N.E.2d 1259, 1262 (Ind. Ct. App. 1996).

92. See *id.*

93. IND. APP. R. 6(B).

94. See *Yin v. Society Nat'l Bank Ind.*, 665 N.E.2d 58, 66 (Ind. Ct. App. 1996), *trans. denied*; *Periquet-Febres v. Febres*, 659 N.E.2d 602, 607 (Ind. Ct. App. 1996), *trans. denied*.

95. *Yin*, 665 N.E.2d at 65.

96. See *Periquet-Febres*, 659 N.E.2d at 608.

97. See *id.*

98. 663 N.E.2d 789 (Ind. Ct. App. 1996).

supreme court acted in ways that reinforce the plenary scope of its transfer jurisdiction, but which indicate its unwillingness to address issues that are not "live."

In procedural matters, the court of appeals demonstrated restraint on several occasions by its willingness to be tough in response to poor appellate practice, even though it ordinarily seeks to resolve appeals on the merits. In particular, the *prima facie* error rule stood out as a tool for the expeditious resolution of unbriefed or poorly briefed appeals. With respect to standards of review, traditional deference to trial courts and administrative agencies in matters of discretion and fact-finding remains the watchword of appellate review. Finally, in view of the state constitutional right to an appeal, the court of appeals displayed restraint in application of its power at common law or by rule to shift costs or issue sanctions.

III. REACHING OUT: CAMERAS AND COMMENTARY

A. *Reducing the Total Elapsed Time of Appeals Involving Children's Interests*

In January 1996, Chief Justice Shepard announced a plan to bring cases involving the interests of children "to the front of the line."⁹⁹ One year later, he proclaimed that Indiana's appellate courts, principally the Indiana Court of Appeals, have cut the total elapsed time between final judgment in a trial court to final decision in an appeal by five months.¹⁰⁰ When one considers that the average time after briefing is completed that the court of appeals issues its decisions is 2.6 months, this remarkable reduction in time mainly results from shrewd, strict case management. Essentially, the reduction in time comes from the period that attorneys spend putting together the record of proceedings and drafting motions and briefs. By requiring attorneys to move children's cases to the "top of the stack" in their own practices, Indiana's courts have made a dramatic improvement in settling the most important affairs in people's lives.

B. *Heralding Change at the Court of Appeals*

Chief Judge Sharpnack and Judge Kirsch collaborated on an article in *Res Gestae* in which they outlined the court of appeals findings from an eighteen month study.¹⁰¹ They explained that the proposed ABA Standards on Appellate Practice were the motivating factor behind the study, which revealed that our court of appeals ranks among the nation's very best in many ways.¹⁰² The authors noted that the appellate rules allow attorneys more than three times the amount of time proposed in the ABA standards to file and brief an appeal and that the time it takes an appellant to prepare a record of proceedings usually exceeds the time it takes

99. Shepard, *supra* note 21, at 34-35.

100. Randall T. Shepard, State of the Judiciary: Trying Something New, Address to the General Assembly (Jan. 30, 1997), in *RES GESTAE*, Mar. 1997, at 12, 12.

101. John T. Sharpnack & James S. Kirsch, *Advancing the Interests of Children n in Appellate Practice*, *RES GESTAE*, Mar. 1996, at 11.

102. *Id.*

for the court to render an opinion.¹⁰³ Finally, the court learned that it granted extensions over and above the generous allotment of time afforded by the appellate rules in about half of all cases.¹⁰⁴

Between the appellate study and the experiment with cases involving children's interests, the court of appeals corroborated much of what it believed. That is, deadlines work. The greatest impact on the reduction of time it takes from judgment in the trial court to final resolution of an appeal is made by managing the time appellate attorneys take to prepare their clients' appeals. Expect the court to begin experiments in 1997 with differentiated case management, appellate ADR, and strict limitation of motions to enlarge time or page limits in addition to the electronic transcript filing permitted by Appellate Rule 7.1.¹⁰⁵

C. Justice Sullivan Explains Transfer

Justice Sullivan authored a "must read" article¹⁰⁶ for any attorney considering whether to petition the Indiana Supreme Court to grant transfer of an appeal. Justice Sullivan pulls back the veil of mystery enshrouding much of the supreme court's work by explaining the timeline of case disposition from the moment it is fully briefed and filed with the clerk.¹⁰⁷ He provides an example of effective petition drafting for appellate practitioners to model.¹⁰⁸ Additionally, Justice Sullivan emphatically reminds the reader that the court occasionally reverses on an issue that the petitioner did not raise in her petition for transfer.¹⁰⁹ All issues are squarely before the supreme court on transfer because the court of appeals decision is vacated at the moment that transfer is granted.¹¹⁰ Justice Sullivan underscores this fact of appellate procedure by announcing that beginning in 1996, the supreme court began publishing notice of its orders granting or denying transfer in West's North Eastern Reporter.¹¹¹ Publication of these orders is a service to the litigants in individual cases more than anything else, but it also serves to notify the federal courts and the appellate bar whether a recent court of appeals decision has been vacated or is still a good law. Thus, attorneys are reminded to double-check their research when citing new court of appeals decisions as controlling authority.¹¹²

103. *Id.*

104. *Id.*

105. IND. APP. R. 7.1.

106. Frank Sullivan, Jr., *Petitions to Transfer: New Rules, New Procedures*, RES GESTAE, Feb. 1996, at 8.

107. *Id.* at 10.

108. *Id.* at 9.

109. *Id.* at 10 n.9.

110. *See* Chandler v. Board of Zoning Appeals, 658 N.E.2d 80 n.1 (Ind. 1995).

111. Sullivan, *supra* note 106, at 10.

112. It is always a bit bold to cite a new court of appeals decision within 120 days of it being handed down because the window for petitioning for transfer does not close for 60 days. If a petition is filed, then the time it takes for the Indiana Supreme Court Administrator's office to

D. The Appellate Courts Hit the Road

The year 1996 was an unprecedented one for the Indiana's appellate courts as the supreme court and courts of appeals made their proceedings available to more Hoosiers than at any time in recent memory. The supreme court held oral argument in Evansville, West Lafayette, Fort Wayne, South Bend, and Crown Point in addition to its regular schedule of hearings in its Indianapolis courtroom, and the court of appeals heard arguments at eleven locations in 1996. The courts attempted to match the arguments geographically to the cities they visit, but such harmonious planning is not always possible. Local bar associations have graciously welcomed the courts by hosting receptions where the judges can exchange ideas with practicing attorneys, trial judges, and students in relaxed settings.

E. Cameras in the Supreme Court

Indiana became the forty-eighth state to allow the news media to use television cameras or other electronic recording equipment to record proceedings in some of its courts. Indiana's experiment with cameras was initiated with oral arguments in the supreme court. The supreme court chose to experiment on itself in order to gain a firsthand understanding of the "look and feel" of having the new activity in the courtroom and the rapport that would develop between court and media prior to announcing a rule for all the trial courts.

Thus far, the experiment with cameras has proven successful. Reporters have taken advantage of the opportunity to record the proceedings in about half of the arguments in which cameras have been permitted, and the court has functioned with little or no distraction. Media interest was very high initially due to the novelty, but interest has since moderated according to the news value of the case. The rules have been crafted in such a way that they encourage reporters to work out the details of optimizing pooled coverage. Generally, pool operation is determined on a first-come-first-served basis, with requests due at least twenty-four hours prior to the argument, but in one case the local news crews agreed ahead of time which organization would be "the pool."

Not everyone has been happy with the experiment, however. Locally infamous murder cases were argued in two cities, Evansville and South Bend, which led to the court being criticized by the victims' families for sensationalizing the murders.

Overall, the experiment with cameras has yielded a very cooperative relationship between the court and news organizations. Having built a solid

prepare the case for conference and for the court to confer and vote could take up to another 60 days. Even then, the court may decide to order oral argument for the purpose of deciding whether to grant transfer, which could delay the transfer decision up to another 60 days. Thus, neither checking the advance sheets nor Shepardizing cases will be enough research in some cases; rather, a call to the Clerk's office to determine the pendency of a petition for transfer might be required to accurately determine if a recent court of appeals decision may be relied on as binding authority.

foundation with cooperative effort, extension of the experiment should be expected in 1997 and 1998.

IV. CREATION OF APPELLATE PRACTICE SECTION IN INDIANA STATE BAR ASSOCIATION

A. History and Mission

The Indiana State Bar Association had for some time devoted a measure of its energy to scrutiny of appellate practice in Indiana. To this end an Appellate Issues Study Committee was formed in 1995. The committee was chaired by George T. Patton, Jr., of Indianapolis' Bose, McKinney, & Evans and a former contributor to the *Indiana Law Review* in this space. With the firm backing of many judges from our court of appeals, Patton undertook an aggressive plan of action.

The committee met in Indianapolis in March 1996 and again during the Bench and Bar conference in April. The committee discussed "redesigning" itself in a way that it could become either a permanent committee of the Litigation Section or section of its own. Subcommittees were organized and reorganized to meet the breadth of the section's needs.

These early efforts were the catalyst for the study committee achieving full recognition as a section of the Indiana State Bar Association in 1996 at its October 3 convention in French Lick. Patton outlined the Section's mission as one of fostering dialogue between bench and bar to continually improve the law and assist both the regular and occasional appellate practitioner through the production of texts and manuals and continuing legal education.

B. Getting Down to Business

A slate of officers was approved by acclamation.¹¹³ A Section Council would also be established to mirror the geographic districts of the court of appeals. To date, approximately 170 attorneys have joined the Appellate Practice Section.

Karl Mulvaney, former Indiana Supreme Court Administrator and now a partner at Bingham, Summers, Welsh & Spilman, chairs the Appellate Rules and Initiatives Subcommittee. He presented the results of a survey he conducted of his subcommittee's members. The survey's questions probed complex issues, and discussion of the issues raised was lively. Opinions were mixed on the topics of appellate alternative dispute resolution and the importance of oral argument. General consensus was reached that the Section should be pro-actively involved in rulemaking, that page limitations for transfer petitions are good, that the Section may want to work with the Indiana Judges Association to help resolve the

113. The Appellate Practice Section officers are:

Chair: George T. Patton, Jr.;
Chair-Elect: Hon. Edward W. Najam, Jr.;
Vice-Chair: Nana M. Quay-Smith;
Secretary: Douglas E. Cressler;
Treasurer: James A. Joven.

problems causing delays in record preparation, and that a docketing statement that replaces the notice of appearance could be a very useful tool for case management. The last of these, a docketing statement, may provide the Section with its first substantive contribution to Indiana's Appellate Practice in 1997.

A Publications Committee was established. Nana M. Quay-Smith, also of Bingham, Summers, Welsh & Spilman, chairs the committee, which plans to publish a quarterly newsletter beginning in 1997. The newsletter will likely include rule amendments, case annotations, a letter from the Chair, CLE schedule, and other events of interest to the appellate practitioner.¹¹⁴

C. A Proposed Docketing Statement and the Advent of Appellate Case Management

Following the discussion at the Appellate Practice Section's October meeting in French Lick, the Appellate Rules and Initiatives Committee has undertaken the project of drafting a new docketing statement that would amend Appellate Rule 2.

The intention driving the creation of a docketing statement is to streamline the appellate process by providing the court of appeals with more information so that it may better manage cases. A docketing statement would enable the court to make better reasoned decisions concerning enlargements of time and it may enable the court to divert some appeals to alternative dispute resolution or to hold pre-appeal conferences in appropriate cases. By tracking cases, the court also may learn when it can effectively consolidate appeals raising identical legal issues.

Substantial issues still must be resolved before a docketing statement can be instituted. For example, should filing the docketing statement be jurisdictional or simply a notice? What information should the appellee be expected to file in response to a docketing statement? What should a docketing statement be titled? These issues are scheduled for resolution in 1997, and are providing the Appellate Practice Section with substantial, meaningful work from the start.

Judge Kirsch spearheads the project and has drafted proposed language.¹¹⁵

114. The first newsletter was published in early 1997. Copies may be obtained from the Indiana State Bar Association.

115. The proposed text of the amendment to Appellate Rule 2, as of June 1997, is as follows:

(A) [No change from present rule]

(B) [No change from present rule]

(C) Notice of Appeal. Any party seeking an appeal or review by the Court of Appeals shall file a notice of appeal with the Clerk of the Supreme Court, Court of Appeals and Tax Court.

(1) The notice of appeal shall be filed within fourteen days of the filing of the praecipe and shall set forth the following information, as applicable:

Party information

(a) Name, address and telephone number of the parties initiating the appeal or review;

(b) Name, address, attorney number, FAX number, and computer address, if any,

-
- of the attorneys representing the parties initiating the appeal or review,
- (c) The name of the appellate or reviewing court with jurisdiction over the case; and
 - (d) Whether the attorney is requesting service of orders and opinions by FAX pursuant to Appellate Rule 12(F).

Trial information

- (a) Title of case;
- (b) Trial court or other tribunal;
- (c) Case number;
- (d) Name of trial judge;
- (e) Date case initially commenced;
- (f) Date of judgment or order;
- (g) Whether trial was by judge or jury;
- (h) Synopsis of judgment and sentence, if applicable; and
- (i) Case type using classification in Administrative Rule 8(B)(3).

Record information

- (a) Date praecipe was filed;
- (b) Date record is due to be filed; and
- (c) The following transcript information:
 - 1) Name, address and telephone number of court reporter responsible for preparing transcript.
 - 2) Date ordered (or reason it has not been ordered);
 - 3) Payment arrangements;
 - 4) Estimated length of transcript;
 - 5) Estimated time required for preparation; and
 - 6) Estimated completion date.

Appeal information

- (a) A short and plain statement of the anticipated issues on appeal; provided, however, that the statement of anticipated issues shall not prevent the raising of any issue on appeal;
- (b) Prior appeals in same case;
- (c) Related appeals (prior, pending or potential) known to the party;
- (d) Indication whether a request for oral argument is anticipated;
- (e) Pre-appeal conference request; if desired, include purpose of proposed conference;
- (f) Criminal cases—status of defendant (i.e., on bond, incarcerated and, if so, where);
- (g) Civil cases—whether Alternative Dispute Resolution has been used and whether it should be used on appeal; and
- (h) Certification that case does or does not involve issues relating to custody, support, visitation or parental relationship of a child.

Attachments. The following documents shall be attached to the appearance:

- (a) In civil cases, a copy of the judgment or order appealed from, to include findings of fact and conclusions, where made;
- (b) In criminal cases, a copy of the judgment or order appealed from, to include

Judge Kirsch's proposal has been presented to the Court Committee of the Court of Appeals, which is working jointly with the Appellate Practice Section's Rules and Initiatives Committee on the project. Comments and suggestions should be directed to Judge Kirsch or Karl Mulvaney.

V. PERSONNEL CHANGES AT THE SUPREME COURT

A. *Departure of Roger O. DeBruler*

Roger O. DeBruler retired on August 7, 1996, before a packed supreme courtroom. Justice DeBruler was Indiana's last justice elected on a partisan ticket (Democrat) and second only to Isaac Blackford as the high court's longest serving justice. To emphasize the enormity of Justice DeBruler's career on the court, a ninety page list of his 886 majority, 590 dissenting, and 273 concurring opinions lined the walls of the courtroom at his retirement ceremony. Much has already been written about the profound work of Justice DeBruler in service to Indiana,¹¹⁶ and therefore this author will not attempt to reduce that commentary to a sentence or two. Rather, as important as it is to remember Justice DeBruler as a stalwart of fairness, it is just as important to think of Roger DeBruler as a wonderful person who "was also a judge." He embodies the qualities of kindness, compassion, humility, and integrity, and all who have known the judge will hold these memories closest when remembering Justice DeBruler.

any sentencing order;

(c) A copy of any motion to correct errors filed in the trial court; and

(d) A copy of the praecipe.

2. Sanctions

(a) If any party responsible for filing a notice of appeal fails to file the notice as provided herein, such party or party's attorney shall pay to the Clerk of the Supreme Court and Court of Appeals a sanction of One Hundred Dollars (\$100.00) if the notice is filed within twenty-eight days of the filing of the praecipe and Two Hundred Fifty Dollars (\$250.00) if filed thereafter.

(b) The Clerk of the Supreme Court and Court of Appeals shall not accept for filing any Record of the Proceedings.

(D) [Present 2(C)]

Note: Language must be drafted for App. R. 2.1 stating that the filing of a Notice of Appeal satisfies the appearance requirement. It may be advisable to cross-reference this in the amendments to 2(C).

IND. APP. R. 2(C) (proposed draft May 19, 1997) (Appellate Practice Section, Rules and Initiatives Comm., Indiana State Bar Ass'n & Indiana Court of Appeals Case Management Comm.)

116. Chief Justice Randall T. Shepard, *On the Retirement of Justice Roger O. DeBruler*, 30 IND. L. REV. 7 (1997); Justice Frank Sullivan, Jr., *A Tribute to Justice Roger O. DeBruler*, 30 IND. L. REV. 11 (1997); Kenneth M. Stroud, *Justice DeBruler and the Dissenting Opinion*, 30 IND. L. REV. 15 (1997).

B. Appointment of Theodore R. Boehm to Indiana Supreme Court

Theodore R., “Ted,” Boehm took the oath as Indiana’s 104th supreme court justice on the day of Roger DeBruler’s retirement. Justice Boehm comes to the Indiana Supreme Court from the Indianapolis law firm of Baker & Daniels, where he had served for several years as managing partner before leaving for corporate work at General Electric and Eli Lilly and, finally, a return to the firm. A graduate of Harvard Law School, Justice Boehm began his career as a law clerk to Chief Justice of the United States, Earl Warren during the October 1964 Term, when the Court issued its famous opinions in *Escobedo v. Illinois*¹¹⁷ and *Malloy v. Hogan*,¹¹⁸ and civil rights¹¹⁹ cases were filling the docket. Emblematic of the idealism at the core of that experience, Justice Boehm made a stirring speech, in which he illuminated a positive judicial vision upon taking the bench.

As we approach the 21st Century, our courts remain as they were intended by the founders of our union in the 18th Century and of our state in the 19th—the ultimate bulwark of individual rights against abuse of power, and the safety valve for peaceful resolution of disputes, even those arising from earnestly held clashes of fundamental beliefs, values and interests.

* * *

The genius of our system is that we have devised processes to resolve these differences short of bloodshed, revolution or anarchy. This works only because the vast majority of Americans realize that the preservation of this system of government is far more important than the resolution of any given issue.

With all our false steps, injustices, even a civil war along the way, we have achieved over two centuries of more or less continuous progress towards the goals of life, liberty and the pursuit of happiness for all citizens that were framed so long ago.

The stability in form of government that permits this at bottom turns on widespread respect for the process, including the rule of law, and widespread acceptance of the results that we do not like as well as those we do. The ultimate resolution of issues at the polls, in the courts, or if necessary by constitutional amendment has worked well for us.¹²⁰

Reflective of that dedication to justice, Justice Boehm has already begun to

117. 368 U.S. 478 (1964) (Sixth Amendment violated by custodial interrogation of suspect when suspect is not warned of right to remain silent and suspect’s request for lawyer is denied; remedy is suppression of incriminating statements).

118. 378 U.S. 1 (1964) (Due Process Clause of Fourteenth Amendment incorporates Fifth Amendment prohibition of compulsory self-incrimination against states).

119. See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964) (racial segregation in places of public accommodation; trespassing convictions of African-American protesters vacated).

120. Theodore R. Boehm, Remarks upon Swearing in as Justice of Supreme Court of Indiana (Aug. 7, 1997).

make important contributions to the jurisprudence of our supreme court in his first five months on the bench. His opinion in *Van Cleave v. State*¹²¹ is one of the most important criminal law decisions the court has handed down in years. In a question of first impression, *Van Cleave* examines the *Strickland*¹²² standard for constitutionally effective counsel in the context of guilty pleas. *Van Cleave*'s analysis exhibits an intellectual rigor in its survey of the law, and its sound reasoning may be extended in other criminal cases. In short, Justice Boehm's early jurisprudence adds to the strength of our supreme court and promises Hoosiers continued, well-reasoned development of the law for many years to come.

CONCLUSION

The year 1996 was a productive one for Indiana's appellate courts. Many small steps were taken in rulemaking and adjudication to set the stage for significant reforms aimed at streamlining the appellate process in coming years. Overall, the most important development in appellate practice in 1996 was the creation by the Indiana State Bar Association of the Appellate Practice Section. The Section will chart the course of change in the way appeals are prosecuted in Indiana, and every attorney who considers appellate work an important component of his or her practice must pay heed to its work. Better yet, appellate lawyers are encouraged to join the Section and lend a hand for the betterment of appellate practice.

121. 674 N.E.2d 1293 (Ind. 1996).

122. *Strickland v. Washington*, 466 U.S. 668 (1984).

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ*

INTRODUCTION

The area of insurance law received a great deal of attention by the courts and lawmakers during this survey period.¹ This survey will address those decisions discussing new substantive law. Other cases that simply reiterated generally accepted principles of insurance law will not receive attention in this Article.²

The area of automobile insurance coverages, including uninsured/underinsured motorist coverages, received the most attention by the courts during this survey period. Other significant decisions discussing subrogation law, general liability, health insurance coverages and insurance agent liability will be addressed. Finally, recent legislative enactments will be discussed.

I. AUTOMOBILE DECISIONS

A. *Automobile Insurer's Liability for Hospital Lien*

Although not a true insurance decision, *Board of Trustees of Clark Memorial Hospital v. Collins*,³ will certainly affect many insurance companies and attorneys who represent their insureds. In *Collins*, the defendant Collins was injured in an automobile accident in Kentucky by another person who was insured by State Farm Fire & Casualty Company.⁴ Both Collins and the insured were residents of Kentucky.⁵ Collins received treatment from a hospital in Indiana resulting in medical expenses of approximately \$10,000.⁶

The Indiana hospital filed a "Sworn Statement and Notice of Intention to Hold Hospital Lien"⁷ with the Indiana Department of Insurance to recover the amount owed for Collins' medical treatment. The facts demonstrated that neither State

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1. The survey period for this Article is approximately September 1, 1995 to August 1, 1996.

2. Practitioners may wish to review the other decisions not discussed in this Article which include: *American National Fire Insurance Co. v. Rose Acre Farms, Inc.*, 107 F.3d 451 (7th Cir. 1997) (material misrepresentation on umbrella policy); *American Family Mutual Insurance Co. v. Welton*, 926 F. Supp. 811 (S.D. Ind. 1996) (mortgage interest holder's right to insurance proceeds); *Ticor Title Insurance Co. v. FFCA/IIP 1988 Property Co.*, 898 F. Supp. 633 (N.D. Ind. 1995) (title insurer had no duty to defend its insured from a recharacterization claim when insured intended to create a defect in the title); *Mutual Security Life Insurance Co. v. Fidelity & Deposit Co.*, 659 N.E.2d 1096 (Ind. Ct. App. 1995), *trans. denied*, (fidelity bond).

3. 665 N.E.2d 952 (Ind. Ct. App. 1996), *trans. denied*.

4. *Id.* at 953.

5. *Id.*

6. *Id.*

7. *Id.* See IND. CODE §§ 32-8-26-1 to -8 (1993).

Farm nor its insured received any actual notice of the lien by the hospital.⁸

Collins and State Farm negotiated a settlement which included the Indiana hospital bill.⁹ As part of the settlement, Collins agreed to satisfy any liens, but disappeared without paying the Indiana hospital bill.¹⁰ Subsequently, the hospital filed suit against State Farm and Collins.

The court determined that the trial court's entry of summary judgment for State Farm was erroneous and reversed.¹¹ The court found that State Farm possessed constructive notice of the hospital lien because it was authorized to do business in Indiana and the hospital had filed the lien with the Insurance Department.¹² The court concluded that the Indiana Hospital Lien Act¹³ actually creates a legal right¹⁴ that may be enforced against insurance companies doing business in Indiana.¹⁵

Insurance companies must now be cognizant of the locale where treatments are received by persons injured by their insureds. If an insurance company conducts business within the state in which the plaintiff has received treatment, the insurer may wish to check periodically with the state's Insurance Department for the status of any liens. Otherwise, insurers may find an enforceable right of action against them seeking the outstanding medical expenses when they have already made payment to the injured party.

B. Single Limit of Coverage Applies to Loss of Consortium Claim

In *Medley v. Frey*,¹⁶ a question of first impression in Indiana was whether damages for loss of consortium was included in the single limit coverage. The plaintiff's husband was seriously injured and permanently disabled in an automobile accident. The defendant's insurance policy limits were \$100,000 per person and \$300,000 per accident.¹⁷ The plaintiff had Parkinson's disease which required a great amount of care previously given by the husband.¹⁸ The defendant's insurer settled the husband's claim for \$100,000 and the wife asserted a separate loss of consortium claim "under the \$300,000 per accident limit of the

8. *Collins*, 665 N.E.2d at 953.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 954. Filing a claim with the Indiana Department of Insurance gives notice to all who "are insurance companies authorized to do business in Indiana under IC 27-1-3-20." IND. CODE § 32-8-26-4 (1993).

13. IND. CODE §§ 32-8-26-1 to -8 (1993).

14. *Collins*, 665 N.E.2d at 955. (In recognizing that the plaintiff possessed a legal "right," the court rejected State Farm's argument that the hospital only possessed a lien which could not be extended beyond Indiana's border.)

15. *Id.*

16. 660 N.E.2d 1079 (Ind. Ct. App. 1996), *trans. denied*.

17. *Id.* at 1079-80.

18. *Id.* at 1080.

policy.”¹⁹ The defendant’s insurer contended that the loss of consortium damages were included in the payment of the husband’s claim and could not be subject to a separate per person limit of coverage.²⁰

The only previous decision interpreting Indiana law on this issue was a federal decision where the court determined that the loss of consortium claim was subject to the same per person limit of liability coverage as the injured spouse’s claim.²¹ The *Medley* court concluded that the limit on bodily injury damages includes “loss of services, . . . sustained by any one person in an auto accident” based on the language of the policy. The *Medley* court also looked to the policy language which defined “bodily injury” to include “bodily harm, sickness or disease, including death that results.”²² Under this definition, a claim for loss of consortium was not included.²³

The court next looked at the “limitation of liability” provision of the policy which provided: “The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of ‘bodily injury’ sustained by any one person in any one accident.”²⁴

Based upon the policy language, the court concluded that the loss of consortium claim was encompassed within the per person limit of coverage for bodily injury; therefore, the wife could not recover under a separate per person limit.²⁵

C. Interpretation of “Carrying Persons For a Fee” Exclusion

Most personal automobile liability policies contain an exclusion for carrying other persons for a fee.²⁶ During this survey period, two decisions addressed this exclusion and provided certain factors to assist courts in its analysis of this type of exclusion.

In *Meridian Mutual Insurance Co. v. Auto-Owners Insurance Co.*,²⁷ the insured charged co-workers a flat, weekly rate for driving them to work.²⁸ After a serious accident occurred in the insured’s van while driven with permission by

19. *Id.*

20. *Id.*

21. *Id.* (citing *Montgomery v. Farmer’s Ins. Group*, 585 F. Supp. 618, 619 (S.D. Ind. 1984)).

22. *Id.*

23. *Id.*

24. *Id.* at 1080-81.

25. *Id.* at 1081. The court also stated that if the definition of “bodily injury” includes loss of consortium or services, then the claim may not be subject to a per person limit. *Id.* at 1081 n.1. See also *Giardino v. Fierke*, 513 N.E.2d 1168 (Ill. App. Ct. 1987); *Allstate Ins. Co. v. Handegard*, 688 P.2d 1387 (Or. Ct. App. 1984).

26. See, e.g., *infra* note 36 and accompanying text.

27. 659 N.E.2d 207, 209 (Ind. Ct. App. 1995), *trans. granted*, (Ind. May 22, 1996).

28. *Id.*

another, the insured's co-workers filed suit.²⁹ The excess insurer filed a declaratory judgment action asking to be relieved from any coverage obligation because the policy contained a "carrying person for a fee" exclusion.³⁰ After the trial court entered summary judgment in favor of the insurer, an appeal ensued.

In analyzing the exclusion, the court looked to four factors as significant in determining whether the exclusion should apply:

1. whether the amount charged is a definite amount;
2. whether it was proportionate to the actual expenses of the trip;
3. whether payment of the amount was voluntary or was paid as consideration to the driver; and
4. whether the driver and passengers were engaged in a common enterprise.³¹

In applying these factors, the *Meridian Mutual* court concluded that the exclusion applied and stated,

The use of a vehicle to shuttle passengers to and from the same destination on a daily basis for a fixed fee or charge falls within the exclusion. [The insured] charged a fee which was definite, arbitrary and involuntary. This was not a casual use but a regular, ongoing use of the vehicle to transport passengers for a consideration under what was, in effect, a contractual arrangement. We conclude that the van was carrying persons for a fee when the accident occurred, an activity excluded from coverage under the [insurer's] policy.³²

The court in *General Accident Insurance Co. of America v. Gonzales* addressed the same type of exclusion under similar facts.³³ In this case, the insured charged his co-workers five dollars a day for travel to their worksite.³⁴ After the insured and his co-workers were involved in an accident with an uninsured motorist, the passengers sought uninsured motorist claims under the insured's policy.³⁵ The insurer sought to exclude coverage because the policy contained a "carrying person for a fee" exclusion. It did, however, provide for a "share-the expense car pool" exception.³⁶

29. *Id.*

30. The exclusion stated, "This coverage does not apply to: 1. Bodily injury or property damage arising out of the ownership, maintenance or use of a vehicle when used to carry persons or property for a fee. This exclusion does not apply to: a. Shared-expense car pools" *Id.* at 210.

31. *Id.* at 211 (citing *Johnson v. Allstate Ins. Co.*, 505 So. 2d 362, 367 (Ala. 1987)).

32. *Id.* at 212. The court also concluded the "shared-expense car pool" exception to the exclusion was inapplicable because the amount charged by the insured did not reflect a sharing of the expenses, but instead, a flat fee regardless of the expense incurred by the insured. *Id.* at 213.

33. 86 F.3d 673 (7th Cir. 1996).

34. *Id.* at 674.

35. *Id.*

36. The specific exclusion at issue provided that, "A. We do not provide Liability coverage

Although the *General Accident* court agreed with the factors suggested by *Meridian Mutual* as significant to the analysis,³⁷ the Seventh Circuit arrived at a different conclusion and found that the “share-the-expense car pool” exception to the exclusion applied despite the fact that the insured did not account for actual expenses when charging his passengers.³⁸

Despite the fact each case had similar facts, the outcomes of each were different. Practitioners must keep each of these cases in mind and apply the four factor test³⁹ to determine whether coverage exists.

At first glance, some practitioners may feel that the application of a “carrying person for a fee” exclusion to be contrary to public policies such as the promotion of car pools. However, the standard insurance policy does except true car pools where the expenses are shared by the parties. These cases demonstrate that a determination whether the exclusion applies will be very fact sensitive. Insureds who are able to establish that the amounts charged to their passengers go towards expenses as opposed to being an arbitrary figure, will most likely be entitled to insurance coverage.

D. Trucking Insurance—“Bobtail” Policy Application

Most truck drivers maintain what is known as “bobtail” insurance. This type of insurance indemnifies a trucker when he has an accident while operating the tractor unit without a trailer and outside the scope of employment.⁴⁰ Usually, this insurance will apply after the trucker has made a delivery for his client and is returning home.

In *Liberty Mutual Insurance Co. v. Connecticut Indemnity Co.*, a truck driver obtained a shipment for delivery.⁴¹ With the permission of the shipper, the truck driver was allowed to store, uncouple and park the trailer at a truck stop and go home for the weekend.⁴² While returning to the truck stop to retrieve the shipment, the truck driver was involved in an accident with another motorist.⁴³ The issue before the court was whether the shipper’s liability policy or the “bobtail” policy of the trucker was primary on a claim by the injured motorist.

The court determined that the shipper’s liability policy was primary. Because the driver was still within the control of the shipper,⁴⁴ the court reasoned that the trucker was still completing his dispatch orders. Thus, the shipper’s liability

for any person: . . . 5. For that person’s liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee. This exclusion (A.5.) does not apply to a share-the-expense car pool.” *Id.*

37. *Id.* at 675-76.

38. *Id.* at 679.

39. See *supra* note 31 and accompanying text.

40. *Liberty Mut. Ins. Co. v. Connecticut Indem. Co.*, 55 F.3d 1333, 1334 (7th Cir. 1995).

41. *Id.*

42. *Id.*

43. *Id.* at 1335.

44. *Id.* at 1338.

policy, rather than the bobtail policy, had primary responsibility.

The court rejected the shipping company insurer's argument based on *Biel, Inc. v. Kirsch*⁴⁵ that Indiana law dictates a different result. In *Biel*, the Indiana Supreme Court concluded that an employee is not normally within the service of his employer while on his way to or from work.⁴⁶ The *Liberty Mutual* decision appears to contradict *Biel*. In *Liberty Mutual*, it appears that the truck driver was returning to his work site to begin his employment just as every other factory worker does on a daily basis. Nevertheless, the *Liberty Mutual* court found the control of the shipper over the truck driver as being the significant factor to find the shipper's liability policy as primary. -

E. Automobile Medical Payments Subrogation—Payment of Attorney Fees to Insured's Attorney

During this survey period, three cases were decided addressing the rights of an insured's attorney to seek attorney fees and pro rata costs from a lienholder for the recovery of the lien from a tortfeasor.⁴⁷

In *Erie Insurance Co. v. George*,⁴⁸ the insured retained counsel to pursue a lawsuit against a tortfeasor arising from an automobile accident.⁴⁹ After the insured's attorney sent medical bills to his client's insurer for payment pursuant to the medical payments coverage, the insurer submitted a check for the bills, but informed the insured's attorney of its right and intent to pursue subrogation against the tortfeasor.⁵⁰ The insurer then filed a subrogation suit against the tortfeasor.⁵¹ This action prompted the tortfeasor insurer to deposit a check with the court for the amount of the medical bills in order to interplead the insured.⁵²

The insured's attorney intervened in the insurer's subrogation action claiming that the insurer had no right to proceeds from the tortfeasor and sought attorney fees and pro rata costs.⁵³ The trial court entered summary judgment in favor of the insured's attorney, concluding that the insurer possessed no subrogation rights until the insured had settled with or obtained a judgment against the tortfeasor.⁵⁴

45. *Id.* at 1336 (citing *Biel, Inc. v. Kirsch*, 161 N.E.2d 617 (Ind. 1959)).

46. *Biel*, 161 N.E.2d at 618.

47. This author would expect continued interest by the court of appeals on the parties' rights in subrogation cases as well as the amounts owed to the insured's attorneys for fees and costs.

48. 658 N.E.2d 950 (Ind. Ct. App. 1995), *trans. granted*, (Ind. Oct. 7, 1996).

49. *Id.* at 952.

50. *Id.*

51. *Id.*

52. *Id.* See IND. TR. R. 22.

53. *George*, 658 N.E.2d at 952.

54. *Id.* The trial court's determination was based solely upon the belief that the purpose of subrogation was to prevent double recovery by the plaintiff. See *id.* at 953. However, the court of appeals also noted that an insurer's right to subrogation prevents a wrongdoer from shielding himself from liability by knowing that the insured has insurance. *Id.*

On appeal, the trial court was reversed.⁵⁵ At the time the insurer made its payment for the medical bills to the insured, the insurer obtained subrogation rights from which it could pursue the wrongdoer.⁵⁶ However, the court of appeals remanded the action for a factual determination of whether the insured's attorney was entitled to attorney fees and costs for the recovery of the medical payments coverage.⁵⁷ If the insurer was "unjustly enriched" by the work of the insured's attorney in presenting a claim, then the insured's attorney would be entitled to attorney fees and costs.⁵⁸

In other cases addressing subrogation, the decisions of *D'Archangel v. Allstate Insurance Co.*⁵⁹ and *Allstate Insurance Co. v. Smith*⁶⁰ were decided only seven days apart and address identical factual situations. In both cases, the insurers made medical payments to their insureds as a result of an auto accident.⁶¹ The insureds settled their claims against the tortfeasor without filing suit.⁶² As a result, the insurers sought full reimbursement of their medical payments while the insureds sought to recover attorney fees and pro rata costs for recovering the insurer's payments.⁶³

In support of their position, the insurers relied upon statutory language which provides that attorney fees and costs must be paid by the insurer when "claiming subrogation or reimbursement rights to the proceeds of a settlement or judgment *resulting from a legal proceeding* commenced by an insured against a third party legally responsible for personal injury for which payment is made by the insurer."⁶⁴ The insurers argued that because settlement occurred without the insureds filing a lawsuit, no reduction of the subrogation claim for attorney fees and costs was warranted. However, in each case, the court rejected the insurers' arguments.⁶⁵ The *Smith* court succinctly explained its decision by stating:

It is consistent with this policy to conclude that *any time* an insurance company is subrogated from proceeds gained through the insureds' effort and expenses, the insurance company should pay a portion of those expenses, regardless of whether a lawsuit was actually filed. To conclude otherwise would hinder legislative purpose.⁶⁶

These cases definitively establish that insurers must pay their fair share of costs and attorney fees for settlements which include any amount to which the

55. *Id.* at 952.

56. *Id.* at 953.

57. *Id.*

58. *See id.* at 954.

59. 656 N.E.2d 294 (Ind. Ct. App. 1995), *trans. denied*.

60. 656 N.E.2d 1156 (Ind. Ct. App. 1995).

61. *D'Archangel*, 656 N.E.2d at 295; *Smith*, 656 N.E.2d at 1157.

62. *D'Archangel*, 656 N.E.2d at 295; *Smith*, 656 N.E.2d at 1157.

63. *D'Archangel*, 656 N.E.2d at 295; *Smith*, 656 N.E.2d at 1157.

64. IND. CODE § 34-4-41-3 (1993) (emphasis added).

65. *D'Archangel*, 656 N.E.2d at 296-97; *Smith*, 656 N.E.2d at 1159.

66. *Smith*, 656 N.E.2d at 1159.

insurer is subrogated regardless of whether a lawsuit was filed. The only circumstance which allows the insurer to avoid paying the insured is if the insurer actively participates in settling the insured's lawsuit.

F. Uninsured/Underinsured Motorists Coverage

1. *Insured's Failure to Notify Carrier of Settlement with Tortfeasor.*—In every underinsured motorist case, a settlement occurs between the insured and the tortfeasor. The decision of *Commercial Union Insurance Co. v. Moore*⁶⁷ focused upon the effect of the insured's underinsured motorist claim after failing to notify the carrier of his settlement with the tortfeasor. In this case, the insured was a passenger on a motorcycle involved in an accident with another vehicle.⁶⁸ The insured settled his claim with the operator of the motorcycle for the limits of the operator's policy but never notified his carrier of the settlement nor did he obtain permission to settle.⁶⁹ The underinsured motorist coverage contained an exclusion from coverage if the insured failed to notify the insurer of the settlement with the tortfeasor.⁷⁰

Although the trial court denied the insurer's motion for summary judgment, the court of appeals reversed.⁷¹ In reaching this conclusion, the court found that the exclusion was plain and unambiguous and voided coverage because of the insured's failure to comply.⁷²

2. *Limitation on Time to Pursue UM/UIM Claim.*—In *Union Automobile Indemnity Ass'n v. Shields*,⁷³ an automobile accident occurred which resulted in the death of the insured.⁷⁴ The insured's representative notified the insurance agent of the insured's death shortly after it occurred and that an underinsured motorist claim would be pursued.⁷⁵ However, no formal suit or arbitration proceeding had been filed until two years after the insured's death.⁷⁶ Because of the delay in filing, the insurer contended that a policy provision barred the representative from seeking underinsured motorist coverage.⁷⁷ On appeal, the

67. 663 N.E.2d 179 (Ind. Ct. App. 1996), *trans. denied*.

68. *Id.* at 180.

69. *Id.*

70. The exclusion provided: "We do not provide coverage under this endorsement for property damage or bodily injury sustained by any person: . . . 2. If that person or the legal representative settles the bodily injury or property damage claim without our consent." *Id.* at 181. Although not stated in the *Commercial Union* decision, the insurance company's reason for requiring consent is to preserve subrogation rights against the tortfeasor.

71. *Id.*

72. *Id.*

73. 79 F.3d 39 (7th Cir. 1996).

74. *Id.* at 40.

75. *Id.*

76. *Id.*

77. The provision provided:

No suit, action or arbitration proceeding for the recovery of any claim under this

Seventh Circuit affirmed the trial court's grant of summary judgment in favor of the insurer,⁷⁸ although Indiana law had previously determined that a one-year limitation period was unreasonable.⁷⁹ However, *Shields* allows insurers to enforce two-year limitation periods.⁸⁰

This decision also focused upon the ability of insurance companies to waive reliance upon the limitation provision based upon their conduct in dealing with the insured.⁸¹ However, mere silence by the insurer is not sufficient to demonstrate waiver of the time limitation.⁸² If the individual seeking coverage is a party to the contract, the insurer is not required to give notice of the time limitation in the policy because the insured is expected to have read the policy.⁸³ If the individual is not a party to the contract, then the insurance company must give notice of the time limitation to be able to enforce it.⁸⁴

3. *Different Limits for UM/UIM and Bodily Injury Coverages.*—Some insureds possess insurance policies with lower uninsured/underinsured motorist coverages than the limits provided under their bodily injury coverages. In *Hupp v. Canal Insurance Co.*,⁸⁵ an injured insured sought to increase the amount of uninsured motorist coverage to equal the higher limits existing under his bodily injury coverages.⁸⁶ The insured was involved in an automobile accident with an uninsured motorist while the insured was operating his employer's vehicle.⁸⁷ In 1986, the employer first obtained the insurance policy from the insurer⁸⁸ with minimum uninsured motorist coverage limits and did not raise them on any of its successive renewals of the policy.⁸⁹

In seeking the higher limits, the insured relied upon policy language that specified the uninsured motorist coverage was provided "in accordance with

endorsement shall be sustainable in any court of law or equity unless a COVERED PERSON shall have complied with all the terms of this endorsement, nor unless commenced within two (2) years after the occurrence of the loss.

Id.

78. *Id.*

79. *See generally* Scalf v. Globe Am. Cas. Co., 442 N.E.2d 8 (Ind. Ct. App. 1982).

80. *Shields*, 79 F.3d at 41.

81. *Id.*

82. The court distinguished *Stewart v. Walker*, 597 N.E.2d 368 (Ind. Ct. App. 1992), because the party seeking the benefits was a party to the contract.

83. *See Shields*, 79 F.3d at 42.

84. *Id.*

85. 654 N.E.2d 901 (Ind. Ct. App. 1995), *trans. denied*.

86. *Id.*

87. *Id.* at 902.

88. This date is important. Now, insurers must offer their insureds UM/UIM coverage equal to the limits for bodily injury coverages when the insurance coverage is first sought. *See* IND. CODE § 27-5-5-2(a) (Supp. 1996). In 1986, insurers were only required to offer UM/UIM coverage with minimum limits regardless of the limits for bodily injury coverage. *See id.* § 27-7-5-5(a) (1982) (amended 1993).

89. *Hupp*, 654 N.E.2d at 902.

Indiana Statute.”⁹⁰ The insured argued that this provision required the limits of the uninsured motorist coverage to equal the bodily injury limits as required to presently be offered by statute.⁹¹ The court rejected the insured’s argument.⁹² Because the employer was charged a premium for lower limits which complied with the statutory requirements in 1986, the court found that it would be unreasonable to expect the insured to be entitled to higher limits than assessed in the premium.⁹³

4. *Lack of Availability of UM/UIM Coverage for Operation of Moped.*—A question that frequently arises concerns whether UM/UIM coverages are available to injured insureds occupying vehicles other than automobiles. That question was recently addressed in *IDS Property Casualty Insurance Co. v. Kalberer*.⁹⁴ In *Kalberer*, the insured’s son was operating a moped when he was involved in an accident with an underinsured motorist.⁹⁵ The parents, as guardians of the son, sought underinsured motorist coverage for their son after settling for policy limits with the underinsured motorist.⁹⁶ After a declaratory judgment action was filed, the trial court granted summary judgment in favor of the parents finding that underinsured motorist coverage existed.⁹⁷

On appeal, the court of appeals reversed the entry of summary judgment in favor of the parents and remanded for summary judgment to be entered in favor of the insurer.⁹⁸ No underinsured motorist coverage was found to exist because the moped was not an “insured” vehicle.⁹⁹ The court of appeals believed that the Indiana legislature intended to permit an insurer the right to limit their uninsured/underinsured motorist coverage to those owned vehicles from which the insurer has charged a premium for coverage.¹⁰⁰ Because the moped was not a vehicle for which a premium had been charged, no underinsured motorist coverage was available.

5. *Lack of UM/UIM Coverage for Accident with Pony-Drawn Cart.*—The

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 904.

94. 661 N.E.2d 881 (Ind. Ct. App. 1996), *trans. denied*.

95. *Id.* at 882-83.

96. *Id.*

97. *Id.*

98. *Id.* at 885.

99. *Id.*

100. *Id.* at 884-85.

When [uninsured/underinsured motorist coverage] is written to apply to one (1) or more motor vehicles under a single automobile liability policy, such coverage applies only to the operation of those motor vehicles for which a specific (uninsured or underinsured motorist) premium charge has been made and does not apply to the operation of any motor vehicles . . . owned by the named insured for which a premium charge has not been made.

*Hastings Mutual Insurance Co. v. Webb*¹⁰¹ decision provides an interesting factual question and excellent reasoning concerning the rules for construing provisions in insurance policies. In this case, the insured sought uninsured motorist coverage after sustaining injuries from an accident with an uninsured Amish defendant operating a pony-drawn cart.¹⁰² The policy stated that some terms would be defined to apply throughout the policy while special definitions existed for terms contained within quotation marks.¹⁰³ The policy gave a specific definition for the word "trailer,"¹⁰⁴ but it also referred to the word *trailer* without the use of quotation marks within the UM/UIM endorsement.¹⁰⁵ The insured argued that coverage was owed because the policy was ambiguous and did not exclude a pony-drawn cart from coverage.¹⁰⁶ Additionally, the insured argued that if the insurance policy was not ambiguous, coverage was still owed due to the public policy behind Indiana's Uninsured Motorist Statute.¹⁰⁷

The Indiana Court of Appeals determined that no ambiguity existed in the policy.¹⁰⁸ The court focused upon the fact that the insured was seeking uninsured motorist coverage which dispelled any notion that the operator of a pony-drawn cart was a motorist.¹⁰⁹ Similarly, the court found no violation of Indiana's Uninsured Motorist Statute.¹¹⁰ Because the policy was intended to apply to *motor vehicles*¹¹¹ and not pony-drawn vehicles, no coverage was available to the insured.¹¹²

7. *Material Misrepresentation in Acquisition of Liability Coverage and Effect on Uninsured Motorist Coverage.*—During the survey period, an interesting coverage question regarding material misrepresentation in the acquisition of liability insurance coverage was decided by two different courts resulting in different outcomes. Each of these cases merit discussion and considerable scrutiny

101. 659 N.E.2d 1049 (Ind. Ct. App. 1995).

102. *Id.* at 1050.

103. *Id.* at 1051.

104. The definition provided: "I. "Trailer" means a vehicle designed to be pulled by a: 1. Private passenger auto; or 2. Pickup or van. It also means a farm wagon or farm implement while towed by a vehicle listed in 1. or 2. above." *Id.*

105. The key portion defined "uninsured motor vehicle" to include "a land motor vehicle or . . . trailer of any type." *Id.* (emphasis added).

106. *Id.*

107. IND. CODE § 27-7-5-2 (Supp. 1996).

108. *Hastings*, 659 N.E.2d at 1052.

109. *Id.*

110. IND. CODE § 27-7-5-2.

111. *Hastings*, 659 N.E.2d at 1053. Indiana's legislative purpose behind the Uninsured Motorist Statute is to place the insured in a position as if the uninsured "motorist" had complied with Indiana's Financial Responsibility Statute [IND. CODE § 9-23-4-1 (1993)]. See *City of Gary v. Allstate Ins. Co.*, 612 N.E.2d 115, 117 (Ind. 1993). Because the Financial Responsibility Statute only requires those operating motor vehicles to be insured, there was no violation of the Uninsured Motorist Statute by the determination that a pony-drawn vehicle was not a motor vehicle.

112. See *Hastings*, 659 N.E.2d at 1054.

by practitioners if a similar factual question presents itself.

In *Motorists Mutual Insurance Company v. Morris*,¹¹³ a tortfeasor had acquired liability insurance from an insurance company ("liability insurer") by providing material misrepresentations concerning his driving record.¹¹⁴ After the tortfeasor was involved in an accident, the injured plaintiff submitted a claim to the liability insurer which was denied based upon the material misrepresentations of the tortfeasor.¹¹⁵ The injured plaintiff sought and received payments from his uninsured motorist carrier ("UM carrier").¹¹⁶ The liability insurer filed a declaratory judgment to completely rescind the liability insurance coverage based upon the insured's material misrepresentations.¹¹⁷ The UM carrier who was added as a defendant filed a subrogation cross-claim against the tortfeasor to recover the amounts paid to the injured plaintiff.¹¹⁸

After the trial court determined that the liability insurer could not rescind the policy, an appeal ensued.¹¹⁹ The court of appeals reversed the trial court and concluded that the liability insurer could rescind the policy based upon the material misrepresentations of the tortfeasor.¹²⁰ In arriving at its conclusion, the court of appeals based its decision upon three determinations:

- "[T]he legislature's policy of compensating accident victims has been upheld"¹²¹
- "[T]he real dispute here is between insurance companies who are not entitled to protection under [Indiana's Financial Responsibility Act]"¹²²
- the fact that the [UM carrier] accepted and was compensated for the risk of injury to its insured by an uninsured motorist when it issued its uninsured motorist policy.¹²³

Based upon these considerations, the UM carrier was not entitled to subrogate against the liability insurer because the liability policy was rescinded.¹²⁴

The District Court for the Southern District of Indiana faced a similar factual scenario, but arrived at a different conclusion from the *Morris* court.¹²⁵ In *Pekin*,

113. 654 N.E.2d 861 (Ind. Ct. App. 1995).

114. *Id.*

115. *Id.*

116. *Id.* at 862.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 863.

121. *Id.*

122. *Id.*; see IND. CODE § 9-25-4-1 (Supp. 1996).

123. See *Morris*, 654 N.E.2d at 863.

124. *Id.*

125. *Pekin Ins. Co. v. Super*, 912 F. Supp. 409 (S.D. Ind. 1995).

the insured purchased liability coverage from an agent, and on the date that the agent forwarded the insurance application to the insurance company, the insured had an accident.¹²⁶ Two days later, the insurance company reviewed the insured's driving records and discovered that the insured's driver's license was suspended at the time the application was received.¹²⁷

Although the insurance company initially filed a declaratory judgment to void coverage because of misrepresentations, it settled with the insured by agreeing to pay only the minimum insurance requirements under the Indiana Financial Responsibility Act.¹²⁸ However, the injured plaintiff argued that the insurance company was responsible for the excess amount irrespective of the material misrepresentations.¹²⁹ The federal district court disagreed.¹³⁰

The district court concluded that the Indiana Supreme Court would not follow *Morris* because Indiana is a compulsory state requiring drivers to be financially responsible.¹³¹ As a compulsory state, the insurance company was liable only for the minimum amount of insurance coverage under the financial responsibility statute and could avoid any excess liability due to the material misrepresentations.¹³²

Practitioners faced with this type of factual scenario must carefully review both the decisions. The analysis of *Morris* seemingly does not apply to cases involving injured third parties because it involved a dispute between insurance companies. As demonstrated by the *Pekin* decision, the overriding concern is to protect the injured third party plaintiff. Thus, the *Pekin* analysis should be considered the guiding principle on this issue of law.

II. PERSONAL AND COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ISSUES

A. *Effect of Release Language in Lease on Subrogation Rights*

*United Farm Bureau Mutual Insurance Co. v. Owen*¹³³ is a "must read" decision for all attorneys, insurance representatives, and parties involved in lease arrangements. In *Owen*, a group of individuals rented premises from a landlord by executing a lease agreement.¹³⁴ After a fire occurred on the premises, the

126. *Id.* at 410.

127. *Id.*

128. *Id.* (citing IND. CODE § 9-25-4-5 (1993)).

129. *Id.*

130. *Id.* at 412.

131. See *American Underwriters Group Inc. v. Williamson*, 496 N.E.2d 807, 810-11 (Ind. Ct. App. 1986) ("[A]n insurer cannot on the ground of fraud or misrepresentation retrospectively avoid coverage under a *compulsory* or financially responsibility law so as to escape liability to a third party.") (emphasis added).

132. *Pekin*, 912 F. Supp. at 412.

133. 660 N.E.2d 616 (Ind. Ct. App. 1996).

134. *Id.* at 617.

landlord recovered proceeds from his insurance company.¹³⁵ The insurance company thereafter commenced a subrogation suit against the tenants who started the fire.¹³⁶

One of the tenants filed a summary judgment motion relying upon the lease language which released the tenant from any liability for casualty losses. The lease stated:

Landlord and Tenant do each hereby release the other from all liability for any accident, damage or injury caused to person or property, provided, this release shall be effective only to the extent that the injured or damaged party is insured against such injury or damage and only if this release shall not adversely affect the right of the injured or damaged party to recover under such insurance policy.¹³⁷

Based upon this language, the trial court granted the tenant's request for summary judgment.¹³⁸

The Indiana Court of Appeals affirmed this finding.¹³⁹ Because the insurance company stood "in the shoes of its insured" by initiating the subrogation action, the release barred a subrogation action.¹⁴⁰ Whenever a casualty loss is presented in the context of a landlord/tenant dispute, the lease should be reviewed carefully for language which may bar any attempts to collect.

B. Professional Liability Exclusions in a Commercial General Liability Policy

In *Erie Insurance Group v. Alliance Environmental, Inc.*,¹⁴¹ an environmental consulting service prepared an evaluation report for asbestos removal project that was critical of a competitor. The competitor filed a lawsuit alleging defamation and tortious interference with contract. The defendant environmental firm sought coverage under its general liability policy,¹⁴² which was denied the claim because coverage did not include the insured's rendering of a professional service.¹⁴³

The insurer filed a declaratory judgment to determine that no coverage was owed to the insured for the competitor's claim.¹⁴⁴ The court granted summary

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 619.

140. *Id.*

141. 921 F. Supp. 537 (S.D. Ind. 1996), *aff'd*, 102 F.3d 889 (7th Cir. 1996).

142. *Id.* at 538-39. It is important to note that the insured's policy was not a professional liability policy.

143. The "professional services" exclusion provided that the policy did not cover "personal injury" damages "due to . . . any service of professional nature, including but not limited to (1) the preparation or approval of maps, plans, opinions, reports, surveys, designs, or specifications and (2) supervisory, inspection or engineering services." *Id.* at 541.

144. *Id.* at 540.

judgment for the insurance company by determining that all of the insured's actions were done in the course of rendering a professional opinion. Thus, they were subject to the exclusion.¹⁴⁵

Another issue addressed by the court focused upon the claims that the insured's actions were covered by an "advertising injury"¹⁴⁶ clause which did not contain a "professional services" exclusion.¹⁴⁷ However, the court rejected this argument because the statements were clearly made in the course of rendering a professional service rather than in an attempt to "advertise" to acquire new business.¹⁴⁸

C. Application of "Your Product" Exclusion to General Liability Policy

*United Capitol Insurance Co. v. Special Trucks, Inc.*¹⁴⁹ is complex which makes a summary of the facts and analysis difficult. However, the decision is beneficial in discussing the applicability of "your work"¹⁵⁰ and "your product"¹⁵¹ exclusions existing in commercial general liability policies. These exclusions are intended to prevent general liability coverage for the repair or replacement of poor workmanship of the insured.¹⁵² Instead, general liability policies are intended to cover consequential damages (other than the work of the insured) arising from the insured's work.¹⁵³ This decision should be reviewed if the practitioner is facing a coverage question involving a claim for the insured's work performed or any product made.

D. Analysis of Insurance Company's Duty to Defend Insured

During the survey period, the Indiana court of appeals decided a number of cases addressing an insurance company's "duty to defend" its insured. Any practitioner in the insurance coverage area will want to review these cases as the "duty to defend" continually evolves in Indiana.

145. *Id.* at 547.

146. "Advertising injury" was defined as an injury arising out of "oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services." *Id.* at 548.

147. *Id.* at 547.

148. *Id.* at 548.

149. 918 F. Supp. 1250 (N.D. Ind. 1996).

150. Most general liability policies define "your work" to mean "[w]ork or operations performed by you or on your behalf; and materials, parts or equipment furnished in connection with such work or operations." *Id.* at 1254.

151. "Your product" is defined to mean "[a]ny goods or products, other than real property, manufactured, sold handled, distributed or disposed of by you . . ." *Id.*

152. *Id.* at 1257.

153. For example, a general liability policy would cover damages to a computer from a leaking roof constructed by the insured but would not cover the cost to repair or replace the poor workmanship of the roof.

In *Indiana Insurance Co. v. North Vermillion Community School Corp.*,¹⁵⁴ a school teacher sued the insured school corporation alleging that he was fired in violation of his constitutional rights.¹⁵⁵ The school submitted a claim for the lawsuit under its general liability policy. The insurer denied the request contending that it had no "duty to defend" because the firing was an intentional act.¹⁵⁶

The school sought to recover its defense costs after it obtained summary judgment on the fired teacher's claim.¹⁵⁷ Although the court determined that no coverage was available under a "bodily injury" clause,¹⁵⁸ coverage for the school existed under the "personal injury"¹⁵⁹ clause. One of the covered offenses under the "personal injury" protection was a claim for defamation.¹⁶⁰ Because the teacher's complaint against the school contained allegations of defamation,¹⁶¹ the court found that the insurer owed a "duty to defend" and was responsible for the school's defense costs.¹⁶²

In *United Services Automobile Ass'n v. Caplin*,¹⁶³ the insureds sold their home to another family and were sued based upon fraudulent statements allegedly made concerning the home.¹⁶⁴ Even though the insurance company issued a reservation of rights letter, it initially acquiesced in paying the insured's defense costs of an attorney chosen by the insureds.¹⁶⁵ However, when the court of appeals reversed the insureds' summary judgment by finding evidence of fraud, the insurance company refused to provide a further defense.¹⁶⁶

A declaratory judgment action was commenced and each party sought summary judgment.¹⁶⁷ After the trial court found a "duty to defend," the insurance

154. 665 N.E.2d 630 (Ind. Ct. App. 1996), *trans. denied*.

155. *Id.* at 631.

156. *Id.* at 632-33. Two types of coverages provided by the policy were analyzed. "Bodily injury" coverage was defined as "bodily injury, sickness or disease sustained by any person" The second type of coverage available to the school was "personal injury" coverage which was limited to coverage of specific offenses committed by the insured.

157. *Id.* at 632.

158. *Id.* at 635. The court agreed that the school's intentional conduct would not be covered under the "bodily injury" coverage.

159. *Id.*

160. *Id.*

161. *Id.* Judge Staton, in a dissenting opinion, concluded that the teacher's complaint did not contain a claim for defamation. *Id.* at 636. (Staton, J., dissenting). Specifically, the court found a defamation claim under allegations such as: "18. That the Defendants . . . conspired to deprive [the teacher] of his employment and sought to further damage him by impugning his good reputation in the community." *Id.* at 634.

162. *Id.*

163. 656 N.E.2d 1159 (Ind. Ct. App. 1995), *trans. denied*.

164. *Id.* at 1160-61.

165. *Id.* at 1161.

166. *Id.*

167. *Id.*

company appealed.¹⁶⁸ Relying on *Transamerica Insurance Services v. Kopko*,¹⁶⁹ the court of appeals determined the fraudulent and intentional conduct of the insureds fell outside the coverage provided under the homeowners insurance policy. Therefore, no “duty to defend” was owed by the insurance company.¹⁷⁰ Further, an estoppel argument raised by the insureds was rejected because the insurance company had issued a reservation of rights letter.¹⁷¹ If the court had accepted the insureds’ argument, bad policy would have been created because an insurance company would have to deny coverage to an insured in every situation where a coverage question existed.¹⁷²

Two other very significant “duty to defend” cases, *American States Insurance Co. v. Kiger*¹⁷³ and *Seymour Manufacturing Co. v. Commercial Insurance Co.*,¹⁷⁴ addressing environmental coverage issues were also decided during this survey period. Although the facts¹⁷⁵ were slightly different, their outcomes were the same.¹⁷⁶

In *Kiger*, the insured was sued by the Indiana Department of Environmental Management (IDEM) for leakage from an underground storage tank.¹⁷⁷ After the insurer denied coverage for the leakage claim, the insured added the insurer to the lawsuit as a third party defendant.¹⁷⁸ The issue was whether a “pollution exclusion” clause applied even though it required the discharge to be “sudden and accidental.”¹⁷⁹ The court found the exclusion to be ambiguous, and therefore found in favor of the insured.¹⁸⁰ Specifically, the court determined that “sudden” was used to clarify that coverage existed for “unexpected” discharge of pollutants.¹⁸¹

168. *Id.*

169. 570 N.E.2d 1283 (Ind. 1991).

170. *Caplin*, 656 N.E.2d at 1162.

171. *Id.*

172. *Id.* at 1163.

173. 662 N.E.2d 945 (Ind. 1996).

174. 665 N.E.2d 891 (Ind. 1996).

175. *Kiger* involved a claim for leakage of gasoline from an underground storage tank while *Seymour*’s facts concerned a claim for leakage of chemicals from drums.

176. Based upon the fact that both *Kiger* and *Seymour* came to the same conclusion, the focus of this Article will be upon the *Kiger* decision.

177. *Kiger*, 662 N.E.2d at 947.

178. *Id.* at 946.

179. The exact language of the exclusion provided: “This insurance does not apply to: 8. Bodily injury or property damage caused by the dumping, discharge or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental.” *Id.* at 947. The insurance company argued that the pollution in this case was a gradual development as opposed to “sudden.”

180. *Id.* at 948.

181. *Id.* Clearly, this ruling means that the only way the pollution exclusion may apply is if the leakage is intentional or expected by the insured.

III. LIFE, HEALTH AND DISABILITY INSURANCE ISSUES

A. *Need for COBRA Notice by Group Medical Provider*

The facts in *Lim v. White*¹⁸² demonstrate what may occur to insureds when their employers completely close operations. The insured worked at a hotel and was covered under the hotel's group medical insurance plan.¹⁸³ After the hotel sold its operations, it terminated its group medical plan.¹⁸⁴

The insured continued to work for the new owner of the hotel, but could not obtain insurance benefits from the new hotel owner until the expiration of a waiting period.¹⁸⁵ Prior to the sale date, the insured became pregnant but was without insurance coverage because of the waiting period for coverage under the new hotel owner's plan.¹⁸⁶

The insured filed suit claiming coverage might be continued pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) which amended the Employee Retirement Income Security Act (ERISA).¹⁸⁷ Specifically, the insured claimed that upon the occurrence of a "qualifying event" such as termination,¹⁸⁸ the group medical plan must notify the insured of the right to continuation coverage.¹⁸⁹

However, both the trial court and the court of appeals concluded that the insured was not entitled to notification of continued coverage.¹⁹⁰ The plan administrator was not required to notify the plaintiff¹⁹¹ because the right to continued coverage terminated when the group health plan was discontinued.¹⁹² In this case, the insured simply had no coverage available.

B. *ERISA Subrogation for Medical Payments*

Another subrogation case decided by the District Court for the Northern District of Indiana, should be reviewed by all personal injury practitioners who face ERISA liens. In *Murzyn v. Amoco Co. Metropolitan*,¹⁹³ a group health plan paid medical benefits on behalf of two insureds injured in an automobile accident in the amounts of \$39,000 and \$87,000, respectively.¹⁹⁴ The trial court determined that the insureds' damages from the automobile accident were

182. 661 N.E.2d 566 (Ind. Ct. App. 1996).

183. *Id.* at 568.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* (citing 29 U.S.C. §§ 1161-1168 (1994)).

188. *Id.* (citing 29 U.S.C. §§ 1161, 1163(2)).

189. *Id.* at 568-69 (citing 29 U.S.C. § 1166(9)(4)).

190. *Id.* at 568.

191. *Id.*

192. *Id.* (citing 29 U.S.C. § 1162(2)(B)).

193. 925 F. Supp. 594 (N.D. Ind. 1995).

194. *Id.* at 596.

\$680,000 and \$990,000, respectively.¹⁹⁵ However, the tortfeasor's limits of coverage were \$100,000 for each of the claimants.¹⁹⁶

The insurance provider sought reimbursement of the settlement proceeds paid to its insureds.¹⁹⁷ The insurer argued that ERISA preempted any state law which attempted to diminish the insurer lien.¹⁹⁸ However, the insureds contended that they were not fully compensated for the amount of the judgment.¹⁹⁹

Finding no guidance or prohibition from the Seventh Circuit, the district court adopted a "make whole" doctrine which prohibited the group plan from recovering any of its payments until the insureds have been fully compensated for their injuries.²⁰⁰ This decision will be persuasive authority in ERISA claims that group plan subrogation liens will not be honored until the insured is made whole.²⁰¹

C. Designation of Beneficiaries on Life Insurance Policies

In the case, *In re Koors*,²⁰² the father of a family purchased a life insurance policy naming his sole child, a daughter, as the beneficiary.²⁰³ The father then adopted his wife's son from a previous marriage and had another child but never changed the beneficiary designation on the policy.²⁰⁴ After the husband and wife were killed, the children's guardian sought an equitable distribution of the life insurance proceeds despite the sole designation of the daughter as beneficiary.²⁰⁵

The court of appeals reversed the trial court's equitable division of the proceeds.²⁰⁶ The court concluded that the beneficiary designation must be observed and could not be ignored under the facts of this case.²⁰⁷

IV. RELATIONSHIP BETWEEN INSURANCE AGENTS, INSURED AND INSURANCE COMPANIES

A number of decisions during this period addressed the relationship between the insured, insurance agents and insurers. Many of the decisions simply repeated

195. *Id.*

196. *Id.* at 596, 601.

197. *Id.* at 596-97.

198. *Id.* at 597.

199. *Id.*

200. *Id.* at 601. Indiana would apply a pro rata sharing of expenses and attorney fees on a non-ERISA claim. *See* IND. CODE § 34-4-33-12 (1993).

201. If no judgment has been entered to determine the extent of the insured's damages, an interpleader action between the insured and the group health plan may need to be initiated to make that determination.

202. 656 N.E.2d 530 (Ind. Ct. App. 1995).

203. *Id.* at 531.

204. *Id.*

205. *Id.* at 530.

206. *Id.* at 531-32.

207. *Id.*

prior Indiana law and will not be recited within this article.²⁰⁸ However, other decisions are worth referencing for their conclusions.

In *Rollins Burdick Hunter, Inc. v. Board of Trustees*,²⁰⁹ Ball State University contracted with a sports promoter to play a football game in Ireland.²¹⁰ Before executing the contract, Ball State sought assurances from the promoter's insurance agent that insurance included coverage for non-appearance, non-performance.²¹¹ After receiving assurances from the promoter, Ball State executed the contract with the promoter.²¹² When the game was canceled, Ball State discovered that the coverage was never written into the insurance policy and sued the promoter's insurance agent to seek reimbursement for expenses incurred.²¹³

The court of appeals affirmed a jury verdict in favor of Ball State.²¹⁴ In support, the court found that Ball State established itself as a third party beneficiary and was entitled to reimbursement for expenses associated with the game.²¹⁵

Another factual scenario that frequently arose within this survey period focuses upon the liability of the insurance company for the negligence or dishonesty of the agent. In *Benante v. United Pacific Life Insurance Co.*,²¹⁶ an individual identifying himself as an agent for the insurance company received money from a prospective insured for the purchase of an annuity.²¹⁷ When the insured discovered that the agent did not apply her payments toward the purchase of the annuity, she demanded return of her money from the agent and the insurance company.²¹⁸ When the full amount was not returned, she brought suit against each of them.²¹⁹

The main issue before the court was whether the insurance company could be responsible for the agent's actions.²²⁰ The Indiana Supreme Court disagreed with the Indiana Court of Appeals and affirmed the trial court's denial of summary judgment for the insurance company.²²¹ Specifically, the supreme court found that

208. See *Wyrick v. Hartfield*, 654 N.E.2d 913 (Ind. Ct. App. 1995); *Trupiano v. Cincinnati Ins. Co.*, 654 N.E.2d 886 (Ind. Ct. App. 1995), *trans. denied*. The general principle upon which each of these cases stands is that the agent owes no duty to an insured for failing to provide adequate insurance coverage or failing to advise about insurance matters unless a close and long standing relationship existed and the agent is paid a separate fee for advice given.

209. 665 N.E.2d 914, 918 (Ind. Ct. App. 1996).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 919.

214. *Id.* at 918-19.

215. *Id.*

216. 659 N.E.2d 545 (Ind. 1995).

217. *Id.* at 546.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 547-48.

a question of fact existed as to whether the insurance salesman was an agent of the insurance company and whether the insurance company was liable to the prospective insured.²²²

Another decision came to a similar conclusion. The decision of *Plumlee v. Monroe Guaranty Insurance Co.*,²²³ involves a complex factual situation which will not be addressed within this article. However, the decision of the court is similar to the *Benante*²²⁴ conclusion. If faced with this scenario, practitioners should review each of these cases.

III. STATUTORY DEVELOPMENTS

Every year, statutes are amended concerning the insurance industry. However, most of these amendments are not applicable to the general practitioner. This past survey period encompassed three amendments which have wide-spread application.

Recent legislation²²⁵ permits insurance companies, law enforcement agencies, and other governmental agencies to freely exchange information concerning insurance fraud. The statute also contains requirements for protecting private information such as medical records.²²⁶ This statute should provide a defense from any civil claim for wrongful disclosure of such information by insurance companies during an arson investigation.

Other legislation addressing post partum hospital stays²²⁷ specifies the minimum coverage requirements under a health insurance policy for maternity patients. This statute was enacted to address many health plans that deny mothers and babies a reasonable time at a hospital following birth.

Finally, recent legislation²²⁸ also prohibits insurance companies from discriminating in issuing health and accident policies to persons suffering problems from abuse.²²⁹ Any insurance company that discriminates commits an unfair claims practice prohibited by statute.²³⁰

222. *Id.* at 548. Generally, the insurance company is only liable for the actions of its agent if an application for insurance has been accepted and a policy has been issued. *See Aetna Ins. Co. v. Rodriguez*, 517 N.E.2d 386, 388 (Ind. 1988).

223. 655 N.E.2d 350 (Ind. Ct. App. 1995), *trans. denied*.

224. 659 N.E.2d 545 (Ind. 1995).

225. IND. CODE § 27-2-19-6 (Supp. 1996).

226. *Id.* § 27-2-19-6(c).

227. *Id.* § 27-8-24-1 to -5.

228. *Id.* § 27-4-1-4; *Id.* §§ 27-8-24.3-6 to -9.

229. *Id.* § 27-8-24.3-6. "Abuse" is generally defined to include sexual assault, physical injury, reasonable fear of injury, false imprisonment or damage to property to control the behavior of another as exerted between family members. *Id.* § 27-8-24.3-2.

230. *Id.* § 27-8-24.3-9.

RECENT CHANGES IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN*

INTRODUCTION

During the past year, Indiana intellectual property law saw no significant changes. The general assembly did not alter Indiana's trademark, trade secret, and right of publicity statutes. Even so, Indiana intellectual property law practitioners did not have an uneventful year.

Three changes in federal law enacted during the survey period may have a remarkable impact on the protection of trademarks in Indiana. First, the Federal Trademark Dilution Act of 1995¹ provides for a federal cause of action for trademark dilution. Second, the Economic Espionage Act of 1996² makes criminal and civil actions available to the federal government to target actions of economic espionage or theft of trade secrets. Finally, the Anticounterfeiting Consumer Protection Act of 1996³ contains civil and criminal provisions which prohibit trafficking in goods bearing counterfeit trademarks or labelling. Each of these changes in federal law means that Indiana businesses now have new means to protect their trade rights. However, the changes also have potential pitfalls for those aggressively, or over-aggressively, pursuing competition. Accordingly, Indiana practitioners should be aware of these new federal provisions when advising their business clients.

I. THE FEDERAL TRADEMARK DILUTION ACT OF 1995

A. *Overview of Trademark Dilution*

On January 16, 1996, a federal cause of action for trademark dilution was born. The Federal Trademark Dilution Act of 1995 provides that the owner of a "famous" trademark may sue to enjoin the subsequent use of any mark or trade name by another if such use "causes dilution" of the famous mark.⁴ Depending

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1. Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified at 15 U.S.C. §§ 1125(c), 1127 (Supp. I 1995)).

2. Pub. L. No. 104-294, §§ 1-102, 110 Stat. 3488, 3488-91 (1996) (codified at 18 U.S.C.A. §§ 1831-1839 (West Supp. 1997)).

3. Pub. L. No. 104-153, 110 Stat. 1386 (1996) (codified at scattered sections of the U.S.C.). This Article will focus primarily on the amended sections of the Federal Trademark Act. 15 U.S.C. §§ 1051-1127 (1994 & Supp. I 1995).

4. Section 3 of the Federal Trademark Dilution Act amended 15 U.S.C. § 1125 by adding the following:

(c) Remedies for dilution of famous marks

(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after

on one's point of view, Indiana trademark practitioners either have a new weapon with which to protect their clients' interests, or a new hurdle to clear in assisting in the development of their clients' goodwill.

Dilution has been defined as a "weakening or reduction in the ability of a

the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. In determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to—

- (A) the degree of inherent or acquired distinctiveness of the mark;
- (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;
- (C) the duration and extent of advertising and publicity of the mark;
- (D) the geographical extent of the trading area in which the mark is used;
- (E) the channels of trade for the goods or services with which the mark is used;
- (F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' [sic] owner and the person against whom the injunction is sought;
- (G) the nature and extent of use of the same or similar marks by third parties; and
- (H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

(c)(2) In an action brought under this subsection, the owner of the famous mark shall be entitled only to injunctive relief unless the person against whom the injunction is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark. If such willful intent is proven, the owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and the principles of equity.

(c)(3) The ownership by a person of a valid registration under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register shall be a complete bar to an action against that person, with respect to that mark, that is brought by another person under the common law or a statute of a State and that seeks to prevent dilution of the distinctiveness of a mark, label, or form of advertisement.

(c)(4) The following shall not be actionable under this section:

- (A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.
- (B) Noncommercial use of a mark.
- (C) All forms of news reporting and news commentary.

15 U.S.C. § 1125(c) (1994) (Supp. I 1995).

"Dilution" is defined as:

the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of—

- (1) competition between the owner of the famous mark and other parties, or
- (2) likelihood of confusion, mistake, or deception.

Id. § 1127.

mark to clearly and unmistakably distinguish one source”⁵ Dilution may take one of two forms. “Blurring” occurs when the trademark’s distinctiveness is lessened by its use (or the use of a very similar mark) by others and generally involves goods not associated with the owner of the trademark.⁶ Buyers are not confused by multiple usages of the mark, but over time they will no longer connect the trademark exclusively with the owner’s goods or services.⁷ “Tarnishment,” on the other hand, describes the use of a trademark “totally dissonant with the image projected by the mark.”⁸

The primary difference between a dilution cause of action (of either category) and an infringement cause of action is the latter’s requirement of “likelihood of confusion” of source or origin of goods or services.⁹ As Professor McCarthy observes, where infringement leaves off, the dilution statute kicks in.¹⁰ In cases where confusion among consumers regarding the multiple uses of trademarks is highly unlikely (e.g. if the goods or services are so different that confusion is impossible as a matter of law), a successful infringement action is not possible. Conversely, dilution remains available despite the “likelihood of lack of confusion” as to the source of goods or services. In cases of dilution, consumers are able to recognize immediately that the goods marketed under similar marks come from different sources. It is precisely that “gradual attenuation or whittling away of the value of the trademark” which makes dilution “an invasion of the senior user’s property right in its mark [which] gives rise to an independent commercial tort.”¹¹

B. Case Law Interpreting the Act

Two reported federal opinions will be reviewed to give the reader a flavor of the federal court analysis of the new federal dilution statute.

1. *Northern District of Illinois*.—In *Intermatic Inc. v. Toeppen*,¹² Intermatic charged, among other things, that Toeppen’s use of the domain name “intermatic.com” on the Internet violated the federal dilution statute.¹³ Toeppen

5. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS § 24:67, at 24-111 (1996).

6. *See id.* § 24:68, at 24-111 to -12.

7. *See id.* at 24-112. The Second Circuit gave several hypothetical examples of “blurring,” including use of “Dupont” on shoes, “Schlitz” on varnish, and “Kodak” on pianos. *See Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1031 (2d Cir. 1989).

8. MCCARTHY, *supra* note 5, § 24:69, at 24-112. An example of “tarnishment” is where a consumer associates a mark originally used on goods for children with goods or services of a seamy or prurient nature. *See Hasbro, Inc. v. Internet Entertainment Group, Ltd.*, 40 U.S.P.Q.2d 1479 (W.D. Wash. 1996).

9. *See* 15 U.S.C. § 1052 (1994 & Supp. I 1995).

10. MCCARTHY, *supra* note 5, § 24:70, at 24-113.

11. *Id.*

12. 947 F. Supp. 1227 (N.D. Ill. 1996).

13. *Id.* at 1229. Intermatic also included counts for trademark infringement, statutory and common law unfair competition, and various violations of Illinois statutes. *See id.*

registered numerous domain names¹⁴ with Network Solutions, Inc., which prevented other entities from obtaining and using the names.¹⁵ When Intermatic attempted to register "intermatic.com" with Network Solutions, it discovered Toeppen's prior registration and its use of "Intermatic" in connection with the sale of software.¹⁶

The court's opinion considered cross motions for summary judgment.¹⁷ In its consideration of Intermatic's federal dilution count, the court began its discussion by reviewing the history of dilution statutes.¹⁸ Although this part of the opinion provides little in the way of black letter law, it is nonetheless useful as a primer on the rationale behind trademark dilution law and a start on legal research into state dilution rules. The court noted that dilution actions can be traced back to an article published in 1927¹⁹ and is recognized as a cause of action in almost half the states.²⁰ Additionally, the genesis of the federal dilution statute was reviewed by the court.²¹

Federal dilution, according to *Intermatic*, requires a party to "show that the mark is famous and that the complainant's^[22] use . . . in commerce . . . is likely to cause dilution."²³ Dilution is statutorily defined as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception."²⁴ The *Intermatic* court also noted that the federal dilution statute does not pre-empt state law dilution claims, nor does it provide a cause of action against the "non-commercial" use of another's famous mark.²⁵ Additionally, injunctive relief is the sole remedy for a dilution claim unless the plaintiff can prove the defendant's willful intention to dilute the mark or trade on the owner's reputation.²⁶ If willful intention can be proven, the remedies provided by Lanham Act sections 35(a) and 36 (15 U.S.C. §§ 1117(a), 1118) are also available.²⁷

14. *See id.* at 1230.

15. *See id.*

16. *See id.* at 1232.

17. *Id.* at 1229.

18. *Id.* at 1236-37.

19. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

20. *Intermatic*, 947 F. Supp. at 1236.

21. *Id.* at 1237.

22. This term should probably be "defendant's" because the dilution action is concerned with the defendant's use of a mark. Moreover, a plaintiff does not have a "trademark," much less a famous mark, without its use "in commerce." *See* 15 U.S.C. § 1052 (1994 & Supp. I 1995).

23. *Intermatic*, 947 F. Supp. at 1238.

24. 15 U.S.C. § 1127 (1994 & Supp. I 1995).

25. *Intermatic*, 947 F. Supp. at 1238 (citing 15 U.S.C. § 1125(c)(4)(B) (Supp. I 1995)).

26. *See* 15 U.S.C. § 1127(c)(2) (Supp. I 1995).

27. *See id.* These remedial provisions provide for recovery of defendant's profits, sustained damages, and costs of the action along with attorney fees in "exceptional cases." *Id.* § 1117(a)

Although the court acknowledged the statutory factor analysis for determining whether a mark is famous,²⁸ no such analysis was undertaken because the court found that uncontroverted evidence of Intermatic's "long history and use of its mark,"²⁹ along with the federal registration of the "strong fanciful"³⁰ mark, indicated that the mark was famous as a matter of law. Further, Toeppen's use of Intermatic's mark on the Internet, and his intention to sell the domain name to Intermatic, constituted a "commercial use" of the mark.³¹

The only remaining issue was whether Toeppen's use had diluted or was likely to dilute the mark. "[I]n at least two respects," the court found that dilution was likely.³² First, Toeppen's use of the domain name kept Intermatic from effectively identifying and distinguishing its goods over the Internet. Registration of the domain name, "Intermatic," precluded Intermatic from registering and using its own trademark as a domain name. Such conduct "clearly violates the Congressional intent of encouraging the registration and development of trademarks to assist the public in differentiating products."³³ Second, the appearance of the "intermatic.com" designation on Toeppen's web page tended to dilute Intermatic's mark. Not only could the mark be found in numerous messages on the web page, the domain name would also be printed on every hard copy made from the web page.³⁴ Because Intermatic did not have control over the goods and services displayed on the web page, or the context in which its mark was printed, it was thereby unable to control the ultimate reputation of its mark.³⁵ Citing Seventh Circuit cases concerning Illinois dilution law, the court found that such pervasive use of a domain name showed sufficient likelihood of dilution of Intermatic's mark.³⁶

2. *Southern District of New York.*—In *Ringling Brothers-Barnum & Bailey Combined Shows Inc. v. B.E. Windows Corp.*,³⁷ Ringling claimed dilution under the Lanham Act of its trademark "The Greatest Show on Earth"³⁸ by defendant's bar, called "The Greatest Bar on Earth."³⁹ Ringling alleged that it and its goods

(1994). The costs associated with the destruction of infringing articles can also be recovered. See *id.* § 1118.

28. *Intermatic*, 947 F. Supp. at 1238. See *supra* note 4, for the factors listed by the statute.

29. *Id.* at 1239.

30. *Id.*

31. *Id.*

32. *Id.* at 1240.

33. *Id.* (citing *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985)).

34. *Id.*

35. *Id.*

36. *Id.* at 1240-41.

37. 937 F. Supp. 204 (S.D.N.Y. 1996). See also *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Celozzi-Ettleson Chevrolet, Inc.*, 855 F.2d 480 (7th Cir. 1988) (dilution cause of action based on Illinois anti-dilution statute regarding same mark); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel & Dev.*, 955 F. Supp. 598 (E.D. Va. 1997).

38. *Ringling Bros.*, 937 F. Supp. at 205-06.

39. *Id.* at 206.

and services enjoy a family-oriented image, and therefore its trademark would be diluted by its association with a bar.⁴⁰ The court analyzed the federal dilution provision on a motion for a preliminary injunction.⁴¹

Admitting the dearth of precedent regarding interpretation of the dilution provision, the court first turned to the legislative history of the Act. The Act's purpose is "to protect famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it, even in the absence of a likelihood of confusion."⁴² The new cause of action has much the same goal as an infringement action, the protection of marks from those who would try to gain advantage from the goodwill and "established renown" associated with them.⁴³

On the other hand, numerous cases have interpreted New York's anti-dilution statute,⁴⁴ and the court noted the similarities between the state and federal causes of action.⁴⁵ Additionally, the court pointed out that Congress clearly expressed the intent to avoid pre-emption of state dilution statutes.⁴⁶ As a result, the court followed the usual analysis employed in a New York dilution case.⁴⁷ Accordingly, to show entitlement to relief, the plaintiff must demonstrate ownership of a famous mark and a likelihood of dilution of the mark due to the defendant's use of the same or a similar mark.⁴⁸ With reference to the first element of dilution, the court succinctly concluded that the Ringling mark was famous,⁴⁹ particularly in the context or "motif" of a circus. The court noted that "[a]ny unauthorized use of THE GREATEST SHOW ON EARTH will dilute the mark . . . [as will] any use of the phrase in the amusement or circus context[,] . . . even where additional words are added or a single word is substituted"⁵⁰ In other words, if the

40. *See id.* at 207.

41. *Id.*

42. *Id.* at 208 (quoting H.R. REP. NO. 104-374, at 3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 1029, 1030).

43. *See id.*

44. N.Y. GEN. BUS. LAW § 368-d (McKinney 1996).

45. Both are intended to protect a mark with "distinctive quality," allow a dilution claim to be established without regard to competitiveness of the goods or services or a likelihood of confusion, and are applicable to registered and unregistered marks. *See Ringling Bros.*, 937 F. Supp. at 208.

46. *Id.* at 209 (citing H.R. REP. NO. 104-374, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 1029, 1031).

47. *Id.* The court specifically stated that "[b]ecause the anti-dilution statutes are meant to coexist, the analysis of Plaintiff's claims is the same under either statute." *Id.*

48. *See id.*

49. *Id.* It is unclear to the author whether the court determined the mark to be famous because of the broad protection it is to be afforded, or whether the fame the mark enjoys entitled it to wide protection. The former formulation seems to put the cart before the horse; the fame of the mark must precede the determination that it receives the fullest protection, including that of the federal dilution provision. Only when fame is shown, through evidence derived from the marketplace, can the extent of protection be affirmatively stated.

50. *Id.* at 210.

defendant's product or service had related to circuses or amusements, Ringling would have been entitled to relief, even though the marks used were not exactly the same. The second user's mark, however, was "The Greatest Bar on Earth," and the services provided were not associated with or promoted by reference to a circus.

The second element which must be shown is a likelihood of dilution by either tarnishment or blurring.⁵¹ Ringling claimed tarnishment of its mark on the basis of the defendant's use of a similar mark in connection with an "adult establishment where alcohol is served."⁵² The court quickly dismissed this claim because alcohol was served at some Ringling circus performances and some of its sponsors sold alcohol as well.⁵³ The clear implication, understandably, is that a plaintiff cannot be heard to claim dilution by tarnishment where the defendant makes associations with the mark similar to plaintiff's own uses or associations. In such cases, the plaintiff is effectively admitting, by its own actions, that the use or association has not damaged the mark.

The court analyzed dilution by blurring in considerably greater depth. It looked to standards enunciated in *Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc.*,⁵⁴ which included six factors to be considered. They are: (1) the similarity of the marks used, (2) the similarity of the products on which the marks are used, (3) the sophistication of consumers, (4) whether the junior user exhibits predatory intent, (5) the renown of the senior mark, and (6) the renown of the junior mark.⁵⁵ The factors are balanced to determine whether blurring is likely to exist.⁵⁶

Regarding the first factor, similarity of the marks, "[t]he marks in question 'must be "very" or "substantially" similar and . . . absent such similarity, there can be no viable claim of dilution.'"⁵⁷ That language, however, is not as clear as it appears on its face. Although "substantial" similarity is listed (and presumably used) as a standard, several decisions cited by the *Ringling Bros.* court demanded a much higher standard for similarity, finding no similarity unless the marks are all but identical.⁵⁸ Further, the statement above clearly suggests that similarity is

51. *See id.* at 211.

52. *Id.*

53. *Id.*

54. 875 F.2d 1026 (2d Cir. 1989).

55. *Ringling Bros.*, 937 F. Supp. at 211 (citing *Mead*, 875 F.2d at 1035 (Sweet, J., concurring)). Note the similarities between this list of factors for dilution and the list of factors to be considered in a likelihood of confusion analysis in a trademark infringement claim. *See, e.g.*, *Nike, Inc. v. Just Did It Enters.*, 6 F.3d 1225, 1228 (7th Cir. 1993).

56. *See Ringling Bros.*, 937 F. Supp. at 211.

57. *Id.* (quoting *Mead*, 875 F.2d at 1029).

58. *Id.* at 211-12. *See Mead*, 875 F.2d at 1029 (LEXIS and LEXUS not substantially similar); *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 503-04 (2d Cir. 1996) (SPAM and "Spa'am" superficially similar but distinguishable in context); *Stern's Miracle-Gro Prods., Inc. v. Shark Prods., Inc.*, 823 F. Supp. 1077, 1091 (S.D.N.Y. 1993) (MIRACLE-GRO for plant food similar to "Miracle Gro" for hair care products). *But cf. McDonald's Corp. v.*

a threshold issue. Nonetheless, the *Ringling Bros.* court compared the marks in much the same way as in an infringement action and found them not to be substantially similar.⁵⁹ The court treated that finding as one to be balanced without considering whether it might be dispositive.⁶⁰

In analyzing the second factor, which looks at the similarity of the products, the court stated that although "competition is not a factor in dilution analysis, the closer the nature of the goods or services sold by the parties, the greater the likelihood of a loss of Plaintiff's selling power in its trademark."⁶¹ The court first declared circus entertainment and the operation of a bar to be dissimilar "products."⁶² Additionally, the court apparently considered the limited geographical market reach of the bar to indicate a lesser likelihood of association with the Ringling mark, thereby lessening the probability of dilution.⁶³ Thus, the second factor demands not only a comparison of the nature of the goods or services, but also a comparison of the markets in which they are offered.

Under the third factor, greater sophistication of consumers of the senior user's product tends to limit the likelihood of trademark dilution.⁶⁴ Sophisticated consumers are generally less likely to be confused by similar marks because they pay closer attention to the product under consideration, and therefore sophistication weighs against infringement of a mark. Sophisticated consumers are also less likely to associate two marks, thus limiting any loss of fame or distinctiveness of the senior mark.⁶⁵ Ringling's customers, the court found, are not "deliberate, reflective and willful" in their decisions to purchase Ringling's product.⁶⁶ This factor therefore weighed in favor of dilution of the plaintiff's mark.

The fourth factor, predatory intent of the junior user, "requires a showing that the junior user adopted its mark hoping to benefit commercially from association with the senior mark."⁶⁷ Further, because relief from dilution is an equitable remedy, lack of predatory intent is relevant to recovery.⁶⁸ Though no particular evidence of predatory intent was introduced by the plaintiff, the court suggested that the defendant's proceeding without an infringement opinion by trademark

McBagel's, Inc., 649 F. Supp. 1268, 1281 (S.D.N.Y. 1986) ("Mc" prefix on food products supports a claim of dilution). See also *Knaack Mfg. Co. v. Rally Accessories, Inc.*, 955 F. Supp. 991, 1000 (N.D. Ill. 1997).

59. *Ringling Bros.*, 937 F. Supp. at 212.

60. *Id.* at 213.

61. *Id.* at 212.

62. *Id.*

63. *Id.* (citing *Mead*, 875 F.2d at 1031).

64. *Id.*

65. *Id.* at 212-13. See also *Mead*, 875 F.2d at 1031; *Sally Gee, Inc. v. Myra Hogan, Inc.*, 699 F.2d 621, 626 (2d Cir. 1983).

66. *Ringling Bros.*, 937 F. Supp. at 212.

67. *Id.* at 213 (citing *Mead*, 875 F.2d at 1037).

68. *Id.* (citing *Sally Gee*, 699 F.2d at 626).

counsel could indicate some degree of culpability.⁶⁹ This is especially true if no such opinion is rendered even after plaintiff makes charges of improprieties.⁷⁰

In addition to being a factor in its own right, the relative renown of the senior mark may affect other factors. The *Ringling Bros.* court cited *Mead* for the proposition that the greater the fame of a mark, the more likely consumers are to associate two marks, thereby increasing the likelihood of blurring.⁷¹ As noted above, in order to establish a federal dilution cause of action, the plaintiff must show a certain threshold of fame.⁷² Presumably, a lack of fame will not merely be a factor in a claim for blurring, but will be dispositive of the cause of action. A greater degree of fame also means that the plaintiff “needs to focus less on other factors, such as similarity of the products or sophistication of the consumers, to establish blurring.”⁷³ Though not specifically stated by the *Ringling Bros.* court, the implication seems to be that fame might be the most important factor.

Finally, the renown of the junior mark is also a factor which must be considered. If the junior mark’s fame is “non-existent, the likelihood of finding dilution by blurring is minimal.”⁷⁴ The defendant’s relatively small expenditure of \$56,000 on various materials associated with its mark (such as brochures, signs and other paper goods), its lack of advertising, and the “scant media coverage” of the bar did not generate fame for the junior mark.⁷⁵

Unfortunately, in balancing the six factors, the court merely reviewed the factors and decided which side each favored without an in-depth analysis of the weight of the evidence. Ultimately, the court found dilution by blurring to be unlikely.⁷⁶

To conclude, the Federal Trademark Dilution Act provides Indiana businesses with protection for trademarks which they did not enjoy previously. It will take some time for the federal courts of appeal to determine the scope of the new Act. Nonetheless, state causes of action for dilution will certainly aid in the analysis of a federal dilution case. For Indiana practitioners, it may be helpful to review Seventh Circuit and Illinois decisions construing the Illinois dilution statute and Second Circuit decisions construing the New York dilution statute.

II. THE ECONOMIC ESPIONAGE AGE OF 1996

The Economic Espionage Act of 1996 created federal causes of action designed specifically to protect trade secrets. Enforcement of the Act is apparently within the exclusive jurisdiction of the U.S. Government. The major provisions

69. *Id.*

70. *Id.*

71. *Id.*

72. *See supra* note 4 and accompanying text.

73. *Ringling Bros.*, 937 F. Supp. at 213 (citing *Mead Data Cent., Inc. v. Toyota Motor Sales, Inc.*, 875 F.2d 1026, 1038 (2d Cir. 1989)).

74. *Id.*

75. *See id.* at 214.

76. *Id.*

of the Act are criminal in nature; the plain language of the statute provides only for civil actions by the Attorney General.⁷⁷

Although it is certainly too early to appreciate the full impact of this legislation, the Act may have a profound effect on trade secret law and the protection of proprietary information. The Act specifically defines a trade secret as:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public⁷⁸

The federal statutory definition closely resembles the one in the Indiana trade secret statute,⁷⁹ which was modeled after the Uniform Trade Secrets Act. The primary differences between the two are twofold. First, the federal statute lists in greater detail the types of information to be protected, although the Indiana statute broadly protects “information.” Second, the federal definition of a trade secret requires secrecy from “the public,” whereas the Indiana definition requires secrecy from “other persons who can obtain economic value from its disclosure.” Although these differences might appear minimal, it is possible that the federal statute will be interpreted either more broadly or more narrowly than the Indiana statute.

Like the Indiana statute, the Act potentially encompasses an enormous range of scenarios. Interpretation of the Act will naturally revolve around the limitations enumerated in clauses (A) and (B). By using the language “reasonable measures,” Congress evidently intended to allow some leeway regarding the secrecy measures necessary to continue the protection of a trade secret. Presumably, “reasonable measures” could depend on the custom of the trade, common-sense notions of security, and the value of the information to its holder. Like the Indiana statute, the Act ties the independent economic value of the information to its secretive nature. Protected information must, in some way, gain value from not being generally known.⁸⁰ Thus, if it can be shown that information, although secret in

77. See 18 U.S.C.A. § 1831 (West Supp. 1997) (criminal offense of economic espionage); *id.* § 1832 (criminal offense of trade secret theft); *id.* § 1836 (civil proceedings to enjoin violations).

78. *Id.* § 1839.

79. IND. CODE § 24-2-3-2 (1993).

80. 18 U.S.C.A. § 1839 (West Supp. 1997). See also *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind. 1993) (information may be protectible even though garnered from sources in the public domain, where significant expenditures made to generate information).

fact, does not derive value from that condition, the information may not be protected by the Act.

The Act generally prohibits theft of trade secrets. In addition to a blanket prohibition on such conduct,⁸¹ the Act contains a separate provision entitled "Economic espionage," outlawing theft on behalf of foreign entities.⁸² Both provisions prohibit conduct consisting of stealing protected information, copying or conveying protected information without authorization, receiving a stolen trade secret, or attempting or conspiring to commit the above acts.⁸³

The intent element of the "general" provision is "intent to convert a trade secret . . . to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will injure any owner"⁸⁴ Thus, it must be proven that a defendant not only took protected information, but also intended to benefit himself or another and knew such action would injure the owner. In contrast, under the "foreign entity" provision the intent element demands "intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent"⁸⁵ Apparently, the defendant is not required to know or intend that his acts will injure the owner.

The Act also applies to conduct occurring outside the United States, but only under two circumstances. First, if an accused natural person is a citizen or permanent resident alien, or if an accused organization has been organized under federal or state law, liability will result under the Act for nonconforming conduct abroad.⁸⁶ Second, if an act in furtherance of the offense is committed in the United States, foreign action constituting the balance of the crime is covered by the Act.⁸⁷

Penalties provided by the Act can be quite steep. A violation of § 1832, the "general" provision, carries a sentence of up to ten years or fines or both for individuals.⁸⁸ Organizations found guilty are subject to a fine up to \$5,000,000.⁸⁹ For a violation of § 1831, the "foreign" entity provision, an individual may be incarcerated for up to fifteen years and fined up to \$500,000.⁹⁰ Under the same provision, organizations face fines of up to \$10,000,000.⁹¹

III. THE ANTICOUNTERFEITING CONSUMER PROTECTION ACT OF 1996

Signed by President Clinton on July 2, 1996, the Anticounterfeiting Consumer

81. See 18 U.S.C.A. § 1831 (West Supp. 1997).

82. *Id.*

83. See *id.*

84. *Id.* § 1832.

85. *Id.* § 1831.

86. See *id.* § 1837(1).

87. See *id.* § 1837(2).

88. *Id.* § 1832(a).

89. *Id.* § 1832(b).

90. *Id.* § 1831(a).

91. *Id.* § 1831(b).

Protection Act of 1996 is intended to address the “scope and sophistication of modern counterfeiting” of trademarked and copyrighted goods.⁹² The legislative history behind the Act indicates that counterfeiting has changed from what was once considered to be a “victimless crime” to “a multibillion dollar, highly sophisticated illegal business” causing a loss of revenue and jobs.⁹³ The Act makes several changes in federal trademark, copyright, and racketeering law aimed to impede this economic drain on American businesses.⁹⁴

The Act contains two significant changes of which trademark practitioners should be particularly aware. First, section 6 of the Act amends the Federal Trademark Act, allowing any federal or local law enforcement officer to execute an order for seizure of counterfeit goods.⁹⁵ The measure was intended to reduce or eliminate the number of unexecuted seizures due to shortages of manpower within given agencies.⁹⁶ The Senate Report also states that the provision may make such seizures easier for civil litigants, thus allowing the seizure to occur prior to the movement of counterfeit goods from the jurisdiction.⁹⁷ Constitutional considerations of comity between federal and state governments are not affected by the Act; therefore, state officials might not be compelled to execute a seizure order entered by a federal court.⁹⁸

The second change in federal trademark law is likely to be of much greater interest to Indiana businesses. Section 7 of the Act improves the potential remedies available to plaintiffs by providing for statutory damages in counterfeiting cases.⁹⁹ The obvious advantage to the plaintiff is that he or she may

92. S. REP. NO. 104-177, at 1 (1995).

93. *Id.* at 3.

94. Although the possibility of an investigation and/or suit by governmental entities may be important in the assessment of a counterfeiting case, the Act's provisions concerning government action will not be discussed further.

95. The provision reads as follows:

The court shall order that service of a copy of the order under this subsection shall be made by a Federal law enforcement officer (such as a United States marshal or an officer or agent of the United States Customs Service, Secret Service, Federal Bureau of Investigation, or Post Office) or may be made by a State or local law enforcement officer, who, upon making service, shall carry out the seizure under the order.

15 U.S.C.A. § 1116(d)(9) (West Supp. 1997).

96. *See* S. REP. NO. 104-177, at 4 (1995).

97. *Id.*

98. *See id.*

99. The pertinent provision reads as follows:

(c) In a case involving the use of a counterfeit mark (as defined in [15 U.S.C. 1116(d)]) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a), an award of statutory damages for any such use in connection with the sale, offering for sale, or distribution of goods or services in the amount of—

(1) not less than \$500 or more than \$100,000 per counterfeit mark per type of

receive a substantial award without having to prove affirmatively the amount of pecuniary damage sustained. Moreover, a willful counterfeiter stands to pay up to \$1,000,000 per counterfeit mark per type of goods on which the mark is used.¹⁰⁰ Congress incorporated equity into the statutory damage award by authorizing determination of the award “as the court considers just.”¹⁰¹ Therefore, even though the burden of proving damages may be removed, a prudent counterfeiting plaintiff might want to marshal evidence of loss or other harm so as to ensure a good equitable position.

CONCLUSION

Though Indiana’s legislative and judicial branches of government did not face new or significant issues regarding intellectual property law, Indiana trademark and trade secret law practitioners must be aware of new federal pronouncements in these areas. Although Indiana statutes do not contain a remedy for dilution of a trademark, Indiana businesses may now seek redress for such injury under federal law while remaining amenable to civil suit under state law, trade secret theft is now also within the precinct of federal prosecutors and investigators. Finally, Congress enacted new remedies and provisions designed curtail the counterfeiting of and trafficking in trademarked goods. These enactments have significantly changed the protection and remedies available to the trademarks and trade secrets of Indiana businesses.

goods or services sold, offered for sale, or distributed, as the court considers just; or

(2) if the court finds that the use of the counterfeit mark was willful, not more than \$1,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.

15 U.S.C.A. § 1117(c) (West Supp. 1997).

100. *See id.*

101. *Id.*

RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

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INTRODUCTION

From October 1995 to October 1996, the Indiana federal and state appellate courts addressed a number of issues specifically relating to product liability actions. The courts addressed the definition of a "product"; the economic loss rule; the strict liability of pharmaceutical companies under Indiana's Blood Shield Statute; the retroactive application of amendments to the Product Liability Act; proof of a product defect where the product is destroyed; the open and obvious danger rule; alterations and misuse; the admissibility and use of expert scientific evidence in product liability actions; preemption by federal law; and the use of collateral estoppel in product liability cases.

I. DEFINITION OF "PRODUCT"

A. *Electricity Is a "Product" Only When It Reaches the End User or Consumer*

In *Bamberger & Feibleman v. Indianapolis Power & Light Company*,¹ the law firm of Bamberger & Feibleman appealed the trial court's entry of summary judgment in favor of Indianapolis Power & Light Company (IPL). The law firm had filed an action against IPL seeking damages resulting from the closure of their offices during an electrical power outage. They asserted strict liability and negligence claims, complaining of losses resulting from their inability to work while their law offices were closed. The alleged damages included lost billable time, lost time of staff employees, lost rental value of the law offices, and lost value of access to the parking garage. The trial court held that the "economic loss rule" precluded recovery on both the strict liability and negligence claims, and the firm's complaint was dismissed with prejudice.²

On appeal, the Indiana Court of Appeals considered whether under Indiana's Product Liability Act³ (1) a claim arising from an electrical power outage is viable

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1. 665 N.E.2d 933 (Ind. Ct. App. 1996).

2. *Id.* at 935.

3. The Act provides in relevant part:

[A] person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for *physical harm* caused by that product *to the user or consumer or to the user's or consumer's property* if that user or consumer

and (2) whether a claim of product defect that alleges only economic losses can be maintained against a public utility.⁴

In answering the first question, the court held that “[a] plain reading of the statute suggests that it does not apply in this case because the allegedly defective product did not reach the user or consumer.”⁵ The court reasoned that, although electricity can be a product under the Act, “the electricity must be in a marketable and marketed state at the time it causes the injury in order to be treated as a product under the strict liability doctrine. Thus, it must be reduced from a transmission voltage to a consumption voltage.”⁶ The court cited with favor its prior decision in *Petroski v. Northern Indiana Public Service Co.*,⁷ where Judge Staton observed:

Technically, until the electricity reaches its destination in a home or factory, it is transmitted by equipment over lines under the exclusive control of [the electric company]. The electric company’s transmission and distribution lines are not a part of the end product which reaches the consumer as in the case of bottles and cans which are part of the finished product.⁸

The factual basis for the plaintiffs’ claim in *Bamberger* was the failure of the product to reach the user or consumer. The alleged “defect” existed in the underground power lines, which are not a part of the end product. Because the electricity had not reached its destination, it had not been placed into the stream of commerce.⁹ Thus, the *Bamberger* court held that IPL could not be liable under the Act for an electrical power outage because no product had been delivered.¹⁰ The court was not required to address whether the law firm could recover purely economic damages under the statute because the issue of whether the electricity

is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and if:

- (1) the seller is engaged in the business of selling such a product; and,
- (2) the product is expected to and *does reach the user or consumer* without substantial alteration in the condition in which it is sold by the person sought to be held liable under this chapter.

IND. CODE § 33-1-1.5-3(a) (Supp. 1996) (emphasis added). Physical harm is defined in this statute as: “[B]odily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage.” *Id.* § 33-1-1.5-2(2).

4. *Bamberger*, 665 N.E.2d at 933-34.

5. *Id.* at 937.

6. *Id.* (citing *Public Serv. Ind., Inc. v. Nichols*, 494 N.E.2d 349, 355 (Ind. Ct. App. 1986)).

7. 354 N.E.2d 736 (Ind. App. 1976).

8. *Bamberger*, 665 N.E.2d at 937 (citing *Petroski*, 354 N.E.2d at 747).

9. *Id.*

10. *Id.*

could be considered a product was determinative.¹¹

*B. Economic Losses Are Not Recoverable in Negligence Actions
Premised on Product Defects*

With respect to the firm's negligence claim, the court held that the law firm did not incur a compensable injury.¹² "[W]hen a negligence action is premised on the failure of a product to perform as expected, economic losses are not recoverable unless such failure also causes personal injury or physical harm to property other than to the product itself."¹³ The Indiana Court of Appeals noted that it had been reluctant to extend this economic loss rule to all actions for negligence;¹⁴ however, the *Bamberger* court upheld the application of this rule in product actions under the following rationale:

At the heart of the question of whether economic damages can be recovered under a negligence theory is the basic distinction between the theories of tort and contract law. Negligence theory protects interests related to safety or freedom from physical harm. This includes not only personal injury but damage caused by defective personal property. However, when there is no accident and no physical harm so that the only loss is pecuniary in nature, courts have denied recovery under the rule that purely economic interests are not entitled to protection against mere negligence.¹⁵

The court refused to characterize the economic loss rule as either anachronistic or turning on luck:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the luck of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumers' demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the

11. *See id.*

12. *Id.* at 939.

13. *Id.* at 938 (citing *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1091 (Ind. 1993)).

14. *Id.* (citing *Runde v. Vigus Realty, Inc.*, 617 N.E.2d 572, 578 (Ind. Ct. App. 1993)).

15. *Id.* (citations omitted).

manufacturer agrees that it will.¹⁶

The trial court's entry of summary judgment in favor of IPL was affirmed due to the negation of the damage element of the law firm's negligence claim.¹⁷

C. *Selling a Product vs. Providing a Service*

In *Hill v. Reith-Riley Construction Co.*,¹⁸ the plaintiffs sued two construction companies under Indiana's Product Liability Act, claiming that they had manufactured a component of a dangerously designed and defectively installed product. The contractors had, by agreement with the Indiana Department of Transportation, removed and reset guard rails along an existing roadway so that the shoulder of the road could be resurfaced. As part of the project, the contractors installed new concrete plugs and replaced some rusted rails. The contractors moved for summary judgment, arguing that they were not liable under the Act because they merely provided a service, rather than having sold a product. The trial court granted the motion, and the plaintiffs appealed.

The Indiana Court of Appeals noted that the Product Liability Act specifically excludes from the definition of "product" transactions that are "wholly or predominately" a service.¹⁹ "Predominately" is defined as "for the most part."²⁰ The contractors' agreement with the Indiana Department of Transportation required the removal and resetting of thousands of feet of guard rail incidental to the resurfacing of the highway. The plaintiffs admitted that the resurfacing of the highway was a service. The court stated that the plaintiffs' product liability claim "must fail because the removal and resetting of the guard rail does not fall within the statutory definition of a product for the purposes of the Product Liability Act."²¹

In support of its holding, the court cited *Sapp v. Morton Buildings, Inc.*,²² a Seventh Circuit opinion involving a similar issue: "whether the remodeling of a barn into a stable was a service or the sale of a product under Indiana's Product Liability Act."²³ In *Sapp*, all of the materials used to remodel the barn were manufactured and custom-fitted at the site. Nonetheless, the Seventh Circuit ruled that the transaction was primarily a sale of a service, affirming the trial court's grant of summary judgment in favor of the defendant.²⁴ The *Hill* court considered resurfacing a road to be analogous to remodeling a barn.²⁵ Moreover, new materials were used much less extensively in *Hill* than in *Sapp*, "making the

16. *Id.* at 939 (quoting *Martin Rispens*, 621 N.E.2d at 1090).

17. *See id.*

18. 670 N.E.2d 940 (Ind. Ct. App. 1996).

19. *Id.* at 943 (citing IND. CODE § 33-1-1.5-2(6) (Supp. 1996)).

20. *Id.* (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 927 (9th ed. 1983)).

21. *Id.*

22. 973 F.2d 539 (7th Cir. 1992).

23. *Hill*, 670 N.E.2d at 943.

24. *Sapp*, 973 F.2d at 543.

25. *Hill*, 670 N.E.2d at 943.

resurfacing project even more predominantly a service than the remodeling of the barn.”²⁶ Consequently, the “incidental installation of the new concrete plugs and rails” did not change the predominate thrust of the contract from “service” to “product.”²⁷

II. INDIANA’S BLOOD SHIELD STATUTE

In *JKB, Sr. v. Armour Pharmaceutical Co.*,²⁸ the Indiana Court of Appeals defined the scope of Indiana’s Blood Shield Statute,²⁹ which precludes strict liability actions against certain entities involved with the procurement and processing of whole blood, plasma, blood products, blood derivatives, and other human tissues.³⁰ In *JKB*, the plaintiff alleged that several pharmaceutical companies were negligent and strictly liable in tort for the plaintiff’s contraction of AIDS from blood factor concentrate used in the treatment of hemophilia.

The pharmaceutical companies moved for summary judgment with respect to *JKB*’s strict liability count, arguing that under Indiana’s Blood Shield Statute, the provision of factor concentrate constituted a rendition of a service and not the sale of a product and thus could not give rise to a product liability action.³¹ After the trial court granted the pharmaceutical companies’ motion, the Indiana Court of Appeals accepted jurisdiction of the plaintiff’s interlocutory appeal.

In their summary judgment motions, the pharmaceutical companies argued that (1) they each constituted a “storage facility,” and (2) they satisfied the Blood Shield Statute’s requirement that they be licensed “under the laws of any state for storage of human bodies or parts thereof” by virtue of their licenses issued by the FDA for the manufacture of blood products.³² The Indiana Court of Appeals strictly construed the Blood Shield Statute, finding that it is in derogation of the common law.³³ Under this strict construction, the court held:

[W]e simply cannot conclude that our legislature intended to include a pharmaceutical company, which commercially produces blood products

26. *Id.*

27. *Id.*

28. 660 N.E.2d 602 (Ind. Ct. App. 1996), *trans. denied*.

29. IND. CODE § 16-41-12-11 (1993).

30.

[The] procurement, processing, distribution, or use of whole blood, plasma, blood products, blood derivatives, or other human tissue, such as corneas, bones, or organs, by a *bank, storage facility or hospital*; . . . is the rendition of a service and not the sale of a product. Such services do not give rise to an implied warranty of merchantability or fitness for a particular purpose, nor do the services give rise to strict liability in tort.

Id. (emphasis added). “Bank or storage facility” is defined in the Uniform Anatomical Gift Act as a “facility license, accredited or approved under the laws of any state for storage of human bodies or parts thereof.” *Id.* § 29-2-16-1.

31. *JKB*, 660 N.E.2d at 604.

32. *Id.* at 605.

33. *Id.* at 604-05.

for mass distribution, as an entity within the same class described as an organ or blood “[b]ank or storage facility.” The manufacture and distribution of blood products by pharmaceutical companies is better characterized as the sale of a product rather than a provision of a service. . . . It is quite unlikely that our legislature intended to include pharmaceutical companies in its definition of “[b]ank or storage facility” simply because the manufacture or production of blood products incidentally involves their storage.³⁴

The court reasoned that the legislature could have expressly listed pharmaceutical companies in the statute if it had intended for them to be shielded from liability.³⁵

III. NO RETROACTIVE APPLICATION OF AMENDMENTS TO PRODUCT LIABILITY ACT

During the last survey period, the Indiana legislature amended³⁶ the Comparative Fault Act³⁷ and the Product Liability Act.³⁸ During this survey period, the Indiana Court of Appeals addressed whether certain of these amendments could be applied retroactively.

Although not a product liability case, the court in *Chestnut v. Roof*,³⁹ provided some important dicta regarding the retroactivity of amendments to the Product Liability Act. In *Chestnut*, the plaintiff was injured in a car accident while a passenger in a car driven by her father. The plaintiff filed a lawsuit against the other driver. At the time the plaintiff’s cause of action accrued, section 34-4-33-2 of the Indiana Code defined a “non-party” under the Comparative Fault Act as “a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant.”⁴⁰ The plaintiff’s father could not be named as a non-party because Indiana’s Guest Statute⁴¹ precludes a child’s action against his or her parent. The father was not one who “is, or may be, liable” to the plaintiff.⁴²

During the pendency of the action, the statute⁴³ was amended to change the definition of a non-party to “a person who caused or contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant.”⁴⁴ This permitted the allocation of fault to a non-party even

34. *Id.* at 605 (citation omitted).

35. *Id.*

36. Act effective July 1, 1995, No. 278, 1995 Ind. Acts 4051.

37. IND. CODE §§ 34-4-33-1 to -13 (1993 & Supp. 1996).

38. *Id.* §§ 33-1-1.5-1 to -10.

39. 665 N.E.2d 7 (Ind. Ct. App. 1996).

40. *Id.* at 8 (citing IND. CODE § 34-4-33-2 (1988)).

41. IND. CODE §§ 34-4-40-1 to -4 (1993).

42. *Chestnut*, 665 N.E.2d at 8.

43. IND. CODE § 34-4-33-2(a)(2) (Supp. 1996).

44. *Id.*

where that non-party could not be found liable to the plaintiff.⁴⁵ After the trial court permitted the defendant to amend its answer to name the plaintiff's father as a non-party, the plaintiff brought an interlocutory appeal.

The Indiana Court of Appeals held that, because the legislature did not express an intent to apply the amendments retroactively, the amendment must only be applied prospectively.⁴⁶ Rejecting the defendant's argument that the legislature intended that the amended definition of a non-party apply retroactively. The court relied in part on a memorandum opinion by the District Court for the Northern District of Indiana in *Smith v. Ford Motor Co.*,⁴⁷ in which Judge Lee held that amendments to the Product Liability Act that were omitted from the statute setting forth effective dates were to be applied prospectively only. The *Chestnut* court noted: "[I]f we were to accept [the defendant's] argument . . . , then necessarily the same interpretation would operate with respect to all of the amendments included in the statute. However, amendments that affect existing rights or obligations cannot be applied retroactively."⁴⁸ Several of the other amendments were found to affect substantive rights: the abolishment of strict liability in tort for design defect and duty-to-warn cases;⁴⁹ application of the Product Liability Act to all actions for physical harm brought by a consumer against a manufacturer or seller of a product regardless of the legal theory;⁵⁰ and, the abolishment of the state-of-the-art defense.⁵¹ Therefore, the court concluded that the amendments to the non-party definition were not meant to be applied retroactively.⁵²

IV. DESTRUCTION/LOSS OF PRODUCT AND "SPOILATION" OF EVIDENCE

In *Greco v. Ford Motor Co.*,⁵³ the plaintiffs brought an action against Ford on a design defect theory. After the accident, but before the lawsuit was filed, the vehicle was surrendered to the plaintiff's insurance company. Once the suit against Ford was contemplated, the plaintiffs attempted to re-obtain possession of the vehicle but were unsuccessful. Ford argued that the loss or destruction of various missing components of the vehicle deprived it of an adequate defense and requested dismissal of the action as a sanction. Ford cited a long list of authorities for the proposition that the product is central to the action and, without the entire

45. See *Chestnut*, 665 N.E.2d at 8.

46. See *id.* at 9.

47. No. 1:93CV0143 (N.D. Ind. Nov. 2, 1995) (unpublished mem. opinion).

48. *Chestnut*, 665 N.E.2d at 10 (citing *Brane v. Roth*, 590 N.E.2d 587, 590 (Ind. Ct. App. 1992)).

49. See IND. CODE § 33-1-1.5-1 (Supp. 1996).

50. See *id.* § 33-1-1.5-3.

51. See *id.* § 33-1-1.5-4 (The old state-of-the-art defense statute was replaced with a new statute that provides a rebuttable presumption that the product is not defective if it conformed to the state-of-the-art.).

52. See *Chestnut*, 665 N.E.2d at 10.

53. 937 F. Supp. 810 (S.D. Ind. 1996).

vehicle, it might be deprived of an “irreplaceable part” of its defense.⁵⁴

The district court noted, however, that Ford ignored the fact that “allegations of a product or manufacturing defect differ from those alleging design defects.”⁵⁵ In design defect cases, the focus is on the design rather than the product itself.⁵⁶ “[A] design defect, if it exists, is a constant that is unaffected by the accident equation.”⁵⁷ Ford’s expert proposed that “[m]arks on the vehicle’s wheels and tires can provide critical, physical evidence about the causes of a rollover which cannot be obtained from other sources.”⁵⁸ The district court concluded that, although this evidence was undisputably gone and its absence might be prejudicial to Ford, the extent of the prejudice to Ford was insufficient to award the “draconian remedy” of dismissal.⁵⁹ Moreover, the court did not view the case as presenting intentional or even grossly negligent conduct resulting in the destruction of critical evidence.⁶⁰

Likewise, the district court rejected Ford’s invitation to exclude the plaintiffs from presenting any expert testimony regarding the role of the Bronco II’s design or any of its components in causing the plaintiff’s accident.⁶¹ Without evidence of design, there would not be a *prima facie* case,⁶² which would be tantamount to a dismissal.⁶³

V. INCURRED RISK

In *Meyers v. Furrow Building Materials*,⁶⁴ the Indiana Court of Appeals was asked to consider whether concrete mix is an “unreasonably dangerous” product as defined by the Indiana Product Liability Act, and whether the mix used by the plaintiff was “defective” due to inadequate warnings. The court, however, addressed neither issue, concluding as a matter of law that the plaintiff incurred

54. See *id.* at 814. See e.g., *Pries v. Honda Motor Co.*, 31 F.3d 543, 544 (7th Cir. 1994) (“The car itself may be the best witness about the conditions at the time of the accident. Strong forces leave telltale signs in physical objects, signs that can be read by people who know what to look for and have the right instruments.”).

55. *Greco*, 937 F. Supp. at 814.

56. *Id.*

57. *Id.*

58. *Id.* at 815.

59. *Id.*

60. *Id.* at 815-16.

61. *Id.* at 816.

62. See *id.*

63. See *id.* Ford also argued that summary judgment was appropriate because the plaintiffs would not be able to establish the requisite elements of their product liability claim without the product. According to Ford, the plaintiffs would not be able to prove that the vehicle was configured the way that Ford designed it at the time plaintiffs crashed or that the Bronco II’s design, rather than some other factors, proximately caused the plaintiff’s injuries in this action. The district court held, however, that the plaintiff had established a *prima facie* product liability case. *Id.*

64. 659 N.E.2d 1147 (Ind. Ct. App. 1996), *trans. denied*.

the risk of injury.⁶⁵

The plaintiff, an owner and operator of a campground, purchased thirty-five bags of Rite Concrete Mix from Furrow in order to build a goldfish pond at the campground. The plaintiff had been working with concrete for fourteen years prior to his injury. In the five-year period preceding his injury, he had poured approximately two thousand bags of packaged cement mix. He had previously used the brand of cement manufactured, distributed, and sold by the various defendants and had read the warnings on the bags. Although he had never suffered burns or skin irritation working with concrete before, he knew that other persons had suffered such injuries. After mixing and pouring approximately thirty bags of the concrete the following day, the plaintiff began to trowel some freshly mixed concrete onto an area of the pond. His knees slipped off the board he had placed into the wet concrete, and he immediately felt a burning sensation. Despite his extensive knowledge and experience, the plaintiff continued to work with his knees in wet concrete for five or six minutes. Afterwards, he used a garden hose to rinse off his pants. He did not remove his pants to check his knees or rinse the wet concrete mix off his skin. After finishing his work and cleaning up about twenty-five minutes later, he discovered the skin on his legs had been injured.⁶⁶

Assuming for summary judgment purposes that wet concrete was an “unreasonably dangerous” product subject to the warning requirements of the Act, the court held that judgment for the defendants was proper because the plaintiff was aware of the risk of using the product that injured him.⁶⁷ According to the court, although the incurred risk defense is normally a question of fact, the defense may be found to exist as matter of law, if the evidence is without conflict and the sole inference to be drawn is that the plaintiff knew and appreciated the risk but nevertheless accepted it voluntarily.⁶⁸ More than a general awareness of the potential for injury is required—the plaintiff must have had actual knowledge of the specific risk.⁶⁹ On the other hand, the plaintiff need not have foresight that the particular injury which in fact occurred was going to occur.⁷⁰ Based upon the plaintiff’s extensive knowledge and experience and the facts and circumstances surrounding his injury, the court concluded that, as a matter of law, the plaintiff incurred the risk of injury.⁷¹

65. *Id.* at 1149. “It is a defense to an action brought under the Products Liability Act that the user or consumer bringing the action knew of the defect and was aware of the danger in the product and nevertheless proceeded to make use of the product and was injured.” *Id.* (citing IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1996)).

66. *Id.* at 1150.

67. *Id.*

68. *Id.* at 1149 (citing *Perdue Farms, Inc. v. Pryor*, 646 N.E.2d 715, 718 (Ind. Ct. App. 1995)).

69. *See id.* at 1149-50.

70. *Id.* at 1150.

71. *Id.*

VI. OPEN AND OBVIOUS DANGERS

In *Anderson v. P.A. Radocy & Sons, Inc.*,⁷² the Seventh Circuit considered Indiana's open and obvious danger rule.⁷³ In that case, Anderson was electrocuted while repairing a commercial sign using a non-insulated crane with a metal basket. The trial court granted summary judgment in favor of the defendants; Anderson's estate appealed, arguing that Indiana's open and obvious danger rule does not bar the plaintiff's negligence claims and that the crane and/or generator was in a defective condition and unreasonably dangerous.

The Seventh Circuit noted that Indiana's open and obvious danger rule "bars assessing liability against a manufacturer in product cases based on negligence where defects are latent⁷⁴ and normally observable."⁷⁵ In determining whether a given danger is open and obvious, the court employs an objective test based on what the reasonable consumer would have known.⁷⁶ "[I]f people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious."⁷⁷

The *Anderson* court had to resolve the parties' dispute as to whether the open and obvious danger rule could be used as a defense to a product claim based upon negligence.⁷⁸ The estate argued that the open and obvious danger rule no longer exists as a defense to a negligence claim due to the enactment of the Comparative Fault Act.⁷⁹ The court noted, however, that each of the Indiana Supreme Court cases discussing the open and obvious danger rule suggest that the rule survives as to product liability claims based on negligence.⁸⁰ Furthermore, three product cases decided by the Indiana Court of Appeals suggested to the Seventh Circuit that the open and obvious danger rule survives.⁸¹ Because the Indiana legislature

72. 67 F.3d 619 (7th Cir. 1995).

73. "Indiana's open and obvious danger rule bars assessing liability against a manufacturer in product cases based on negligence where defects are latent and normally observable." *Id.* at 621 (citation omitted).

74. The court should have used the word "patent."

75. *Id.* at 621 (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814-15 (Ind. Ct. App. 1995)).

76. *Id.* at 622.

77. *Id.* (citing *McDonald v. Sandvik Process Sys., Inc.*, 870 F.2d 389, 394 (7th Cir. 1989) (quoting *Kroger Co. Sav-On Store v. Presnell*, 515 N.E.2d 538, 544 (Ind. Ct. App. 1987))).

78. Indiana law does not apply the common-law open and obvious rule to strict liability claims under Indiana's Product Liability Act because the open and obvious danger rule is not listed as an available defense under the Act. *Id.* (citing IND. CODE § 33-1-1.5-4(b) (Supp. 1996)). The Indiana Legislature replaced this defense with the defense of incurred risk. *See id.*

79. *Id.*

80. *Id.* (citing *Miller v. Todd*, 551 N.E.2d 1139, 1143 (Ind. 1990); *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 938 (Ind. Ct. App. 1994) (relying on *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981); *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 442 (Ind. 1990)).

81. *See id.* (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814-15 (Ind. Ct. App.

did not expressly abrogate the open and obvious danger rule and the state's lower courts continued to apply it after the enactment of comparative fault, the Seventh Circuit held that the open and obvious danger rule may be raised to defeat a product claim based on negligence.⁸²

The court then turned to whether the lower court correctly applied the open and obvious danger rule to summarily resolve the case before it. The estate conceded that the decedent realized the metal basket and metal crane arm would not provide him protection from an electrical shock. In addition, the decedent's co-worker testified that he was aware that the generator did not have a ground fault interrupter (GFI). The court reasoned:

[R]easonable journeymen electricians would be aware of the hazards associated with a noninsulated crane, metal basket, and generator without a GFI. That the tools in question were not neophyte-safe does not mean that the tools were unreasonably dangerous. Instead, reasonable journeymen electricians would recognize that the tools must be used with a certain degree of caution. Anderson . . . used caution when [he] disengaged power from the sign once Anderson had experienced the first shock. . . . The precaution of disengaging power from the sign illustrates that the men were aware that electricity could surge through the system. It was only after Anderson believed he had repaired the sign that the power was again engaged. Unfortunately, Anderson was mistaken in believing that he had repaired the sign. Without precautions, he reached for his tools and was electrocuted. The alleged danger surrounding the products was open and obvious.⁸³

The decedent was aware that both caution and certain precautions were necessary to safely complete the repair of the sign. Therefore, the danger surrounding the crane and the generator constituted a recognized condition whose potential harm could have been avoided with the proper precautions.⁸⁴

VII. ALTERATION AND MISUSE

In *Leon v. Caterpillar Industrial, Inc.*,⁸⁵ the Seventh Circuit determined that the plaintiff failed to establish the prerequisites to impose strict liability upon the defendant because the defendant's product was substantially altered by the time it reached the user.⁸⁶ The plaintiff was injured while operating a Caterpillar forklift at Inland Steel ("Inland"). Inland purchased its Caterpillar forklifts from the Caterpillar dealer, Calumet. Inland required that each forklift be equipped

1995); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *Moore v. Stizmark Corp.*, 555 N.E.2d 1305 (Ind. Ct. App. 1990)).

82. *Id.* at 623.

83. *Id.*

84. *Id.* at 624.

85. 69 F.3d 1326 (7th Cir. 1995).

86. *Id.* at 1341.

with a deadman's switch. Because Caterpillar neither manufactured nor installed a deadman's switch, Calumet installed a deadman's switch manufactured by one of Caterpillar's competitors. Additionally, when Inland requested that the forklifts be equipped with bucket seats, Calumet replaced the Caterpillar seats with the competitor's seats. The deadman's switch was activated when pressure was released when the operator arose from the seat. Although Caterpillar was aware of Inland's specifications and Calumet's alterations, it did not inspect the forklifts after the alterations, nor did it consult with Calumet about the alterations.

The plaintiff's job at Inland required him to use one of the altered Caterpillar forklifts. When the plaintiff dismounted the forklift, the deadman's switch should have disengaged the transmission gears. Instead, the forklift suddenly lurched forward, striking the plaintiff in the back and pinning him against a steel column. Heat from a nearby blast furnace caused the forklift seat to collapse, which led to the deadman switch's malfunction.

The court noted that "Indiana courts have held that any change which increases the likelihood of a malfunction . . . is a substantial change."⁸⁷ The court then analyzed the facts with a focus on whether the alterations were foreseeable to Caterpillar. The alleged defect in the forklift was the deadman's switch and seat, which was added by someone other than the manufacturer. Caterpillar was not consulted by Calumet and was unaware that the deadman's switch would be joined to a seat other than its own. In fact, it had no knowledge that its seats would be replaced at all. Thus, Caterpillar had no duty to ensure that its competitor's seats would not malfunction in the furnace building merely because its representatives had knowledge that the forklifts would be operated in an area of extreme heat.⁸⁸ The deadman's switch "affect[ed] the very operation and control of the unit, and its addition constituted a substantial change because by its very installation, it increased the likelihood that the unit would malfunction."⁸⁹ Under the circumstances, the court concluded that the forklift was substantially altered by the time it reached Inland.⁹⁰

The plaintiff cited several non-Indiana cases holding that, because the manufacturer delegated the duty of completing the product to the dealer, the manufacturer would be held liable for any errors on the part of the dealer due to faulty assemblies that were reasonably foreseeable.⁹¹ The court found these cases distinguishable because Caterpillar had delivered a fully assembled product to Calumet.⁹² Furthermore, the parties did not dispute the fact that the forklift was *not* in a defective condition or unreasonably dangerous at the time it left Caterpillar. Caterpillar had no knowledge that the deadman's switch would be joined to a seat other than the one it had installed on the forklift before it left the

87. *Id.* at 1339 (quoting *Bishop v. Firestone Tire & Rubber Co.*, 814 F.2d 437, 443 (7th Cir. 1987)).

88. *See id.* at 1339-40.

89. *Id.*

90. *Id.* at 1338.

91. *Id.* at 1340.

92. *Id.*

factory. Caterpillar did not participate in the design or the installation of the switch, nor did it delegate this task to the dealer where it delivered the assembled forklift as a complete and functional unit. The court refused to “be a party to the extension of strict products liability to such an unreasonable degree, especially when [the plaintiff] is trying to avoid the reality that if the deadman’s switch was, in fact, defective, he should have brought his claim against [the installer of that switch] and not Caterpillar.”⁹³

The Seventh Circuit’s analysis properly focused on the core issue of foreseeability and is clearly consistent with Indiana decisions requiring that a product’s alteration be foreseeable in order to impose strict liability on the manufacturer.⁹⁴

The plaintiff also argued on appeal that the trial court erred in instructing the jury on product misuse. The Seventh Circuit held that there was ample evidence presented at trial to support the instruction.⁹⁵ The plaintiff failed to properly inspect the forklift’s parking brake, failed to turn the ignition off before leaving the forklift unattended, and failed to lower the forks to the ground before dismounting.⁹⁶ Although noting that a product manufacturer may still be strictly liable in the face of misuse where the misuse is reasonably expected, the court concluded “it strains the limits of credulity for [the plaintiff] to assert that Caterpillar should have reasonably expected one to fail to comply with *four independent safety regulations*, when . . . if [the plaintiff] had followed any one of the precautions . . . he would not have been injured.”⁹⁷

VIII. APPLICATION OF *DAUBERT* IN PRODUCTS CASES

In *Cummins v. Lyle Industries*,⁹⁸ a worker who severed three fingers while operating a trim press brought design defect and inadequate warning claims against the trim press manufacturer. The plaintiff appealed a jury verdict for the manufacturer, arguing that the district court abused its discretion in excluding the plaintiff’s expert testimony that there were feasible alternative designs which should have been used in the braking system of the trim press and in excluding that expert’s testimony about the life cycle of the trim press limit switch whose failure allegedly led to the accident.

In finding no abuse of discretion by the trial court, the Seventh Circuit first determined that the district court properly followed the analytical framework established in *Daubert*.⁹⁹ Under *Daubert*, the court must first determine whether

93. See *id.* at 1341.

94. See *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932 (Ind. Ct. App. 1994).

95. *Leon*, 69 F.3d at 1342.

96. *Id.* at 1342-43.

97. *Id.* at 1343-44 (footnotes omitted).

98. 93 F.3d 362 (7th Cir. 1996).

99. *Id.* at 367 (citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

In *Daubert*, the Supreme Court rejected the long-standing *Frye* test, which had required courts to exclude opinion testimony unless the expert’s technique was “generally accepted” as reliable in the

the expert's testimony is reliable.¹⁰⁰ Reliability is determined by insuring that the proffered testimony pertains to scientific knowledge or has been subjected to the scientific method.¹⁰¹ Second, the district court must determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue.¹⁰²

In *Cummins*, the plaintiff's expert had not tested his proposed alternative designs. He instead contended that his designs did not require testing because they involved simple components and widely accepted engineering principles. Stressing the importance of testing in alternative design cases,¹⁰³ the Seventh Circuit noted that the opinions offered by the plaintiff's expert clearly lent themselves to testing and substantiation by the scientific method. The district court was thus well within its discretion in concluding that the absence of such testing indicated that the expert's opinions could not fairly be characterized as scientific knowledge.¹⁰⁴ The district court was found to have "carefully performed its gate keeping function under Rule 702 and heeded the Supreme Court's admonition that 'the focus . . . must be solely on the principles and methodology, not on the conclusions they generate.'"¹⁰⁵

Further, the appellate court upheld the district court's exclusion of evidence concerning the useful life of the limit switch.¹⁰⁶ The district court excluded this testimony because "the plaintiff failed to disclose the cycle life of the switch as a basis for the expert's opinion prior to trial, and failed to supplement [the expert's] discovery responses to reflect this newly discovered information."¹⁰⁷ Also, the source of the plaintiff's expert's information was hearsay that would not be

scientific community. The Court held that the Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony. Under *Daubert*, expert scientific testimony that will assist the trier of fact may be admitted if the proponent of the evidence can establish that it is both reliable and relevant. To be reliable, an inference or assertion must be derived from the scientific method. Proposed testimony must be supported by appropriate validation. To be relevant, the testimony must "fit" the facts of the case such that it will assist the trier of fact in resolving a factual dispute. Rule 702's helpfulness standard requires a valid scientific connection to the pertinent inquiry as a pre-condition to admissibility. In addition, *Daubert* provided four factors for trial courts to consider in determining whether the reasoning or methodology supporting the proposed testimony is scientifically valid and can be applied to the facts at issue: (1) whether the scientific theory or technique can be empirically tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) what is the known or potential rate of error of a particular scientific technique; and (4) whether the theory or technique has garnered wide spread acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 593.

100. *Cummins*, 93 F.3d at 367.

101. *Id.* at 368.

102. *See id.* (quoting *Porter v. Whitehall Labs*, 9 F.3d 607, 616 (7th Cir. 1993)).

103. *See id.*

104. *Id.* at 369.

105. *Id.* at 370 (quoting *Daubert*, 509 U.S. at 594).

106. *See id.* at 371.

107. *Id.* (citations omitted).

reasonably relied upon by others in the field.¹⁰⁸ The appellate court reasoned that allowing plaintiff's expert to render an opinion based on newly acquired evidence would have imposed an unfair burden on the defendant to locate and depose a witness competent to give testimony on the cycle life of the limit switch.¹⁰⁹ Even if the defendant had been granted a continuance, the prejudice to the defendant from the admission of the plaintiff's expert's evidence would not have been fully cured.¹¹⁰ This prejudice would have been compounded by the plaintiff's expert's inability to identify the sources of his information so that they could be questioned by the defendant.¹¹¹ Under these circumstances, the district court was entitled to conclude that there had been an inadequate showing that the hearsay statements relied upon the expert in formulating his opinion were of a type reasonably relied upon by experts in the field.¹¹²

The Indiana Court of Appeals also addressed *Daubert* issues during this survey period. In *Hottinger v. Trugreen Corp.*,¹¹³ the plaintiff claimed that she suffered damages as a result of being exposed to a broad leaf herbicide known as Trimec 2-4-D. The plaintiff's expert, Dr. Heuser, had concluded that Trimec 2-4-D had been the proximate cause of her permanent and continuing injuries. The trial court excluded Dr. Heuser's opinion and entered summary judgment accordingly. On appeal, Trugreen asserted that it was entitled to summary judgment based in part, upon the inadmissibility of the plaintiff's expert's opinion.¹¹⁴

Adopting *Daubert* as the test for determining the admissibility of expert scientific testimony, the *Hottinger* court concluded that the expert's testimony was sufficiently reliable because the expert was a medical doctor and a Ph.D.¹¹⁵ who specialized in internal medicine with an emphasis on the problems experienced by the plaintiff, and the expert's conclusions were supported by scientific

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.* The plaintiff's expert testified that he obtained his figures with respect to the life cycle of the limit switch in conversations with "several representatives from Allen Bradley," the manufacturer of the limit switch. He could not recall the names of the individuals that he spoke with or the dates on which he had obtained this information. *See id.* at 366.

112. *See id.* at 372 (citing FED. R. EVID. 703).

113. 665 N.E.2d 593 (Ind. Ct. App. 1996), *trans. denied*.

114. As an alternative basis for summary judgment, Trugreen asserted that the plaintiff's common law claims based upon the failure to warn were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). *See* 7 U.S.C. § 136v(b) (1994). The court held that:

[t]he broad prohibition imposed by FIFRA against state regulation of warning labels on hazardous substances bars common-law liability attempts to impose liability on top of that provided by federal laws. Accordingly, FIFRA preempts state common law strict liability and negligence claims for defective warnings or the failure to warn of the hazards associated with the products subject to regulation under the Act.

Hottinger, 665 N.E.2d at 598 (citations omitted).

115. The court did not reveal the subject of Dr. Heuser's Ph.D.

publications subject to peer review.¹¹⁶ Based on his expert status, the doctor was permitted to testify that, in his opinion, the plaintiff's injuries were caused by her exposure to the herbicide.¹¹⁷ The doctor's opinion was based upon the temporal proximity of the onset of the plaintiff's symptoms to her exposure to the herbicide, her medical history, his examination, the diagnostic evaluations performed, and his own education and experience. Thus, the scientific principles upon which the expert based his opinion were considered sufficiently reliable to be helpful to the trier of fact.¹¹⁸

In responding to the defendant's allegations that the expert's testimony was "shaky," the court emphasized that the defendant could rely on vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof as "appropriate safeguards."¹¹⁹ The trial court was thus found to have abused its discretion in determining that the physician's opinion did not meet the standards of Rule 702.¹²⁰

Because the court expressly adopted the *Daubert* standards for evaluating proffered expert testimony, Indiana lawyers are now able to specifically rely upon existing court decisions interpreting *Daubert* as persuasive authority in Indiana state courts for the interpretation of Indiana Rule of Evidence 702 and the introduction of expert scientific testimony.

IX. FEDERAL PREEMPTION

A. *Federal National Traffic & Motor Vehicle Safety Act Does Not Preempt State Law Negligence Claims for Failure to Install Airbags*

In *Wilson v. Pleasant*,¹²¹ the estate of a fatal automobile accident victim brought a negligence action against the automobile manufacturer based upon the manufacturer's failure to install an airbag.¹²² The automobile manufacturer argued that the plaintiff's state common-law tort claim of negligence was preempted by the Federal National Traffic and Motor Vehicle Safety Act.¹²³ The Indiana

116. *Hottinger*, 665 N.E.2d at 597-98. Dr. Heuser submitted a peer-reviewed paper of his own that outlined a methodology for using a brain scan to confirm the effects of toxic chemical exposure on the brain.

117. *Id.* at 598.

118. *Id.* at 597.

119. *Id.* at 598.

120. *Id.*

121. 660 N.E.2d 327 (Ind. 1995).

122. See generally Note, Cipollone & Myrick, *Deflating the Airbag Preemption Defense*, 30 IND. L. REV. 827 (1997).

123. 15 U.S.C. §§ 1381-1431 (1988) (the current version of the Safety Act is found at 49 U.S.C. §§ 30101-30169 (1994 & Supp. I 1995), pursuant to a 1994 recodification of the transportation provisions. This case was decided prior to the recodification and, as such, all cites will be to Title 15). Congress passed the Safety Act in 1966 to "reduce traffic accidents and death and injuries to persons resulting from traffic accidents." *Wilson*, 660 N.E.2d at 329 (quoting 15

Supreme Court disagreed.

Pursuant to the authority granted in the Safety Act, the Secretary of Transportation promulgated Federal Motor Vehicle Safety Standard 208 ("Rule 208").¹²⁴ Rule 208 gave automobile manufacturers three possible choices for providing passenger crash protection.¹²⁵ "The choices were: 'First option—frontal/angular automatic protection system. . . . Second option—head-on automatic protection system. . . . Third option—lap and shoulder belt protection system with belt warning.'"¹²⁶ Although an airbag system would have complied with the first or second option in *Wilson*, the automobile Wilson was driving at the time of the accident was equipped with a manual seatbelt system that fully complied with the third option.¹²⁷ The Indiana Supreme Court rejected General Motors' argument that the plaintiff's airbag claim was expressly preempted by the Safety Act.¹²⁸ The court based its decision on the Safety Act's preemption clause's explicit reference only to "state safety standard[s] applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard."¹²⁹ Additionally, the Safety Act contains a savings clause providing "compliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from liability under common law."¹³⁰ After a very lengthy discussion of the appropriate manner in which to analyze an implied preemption argument,¹³¹ the Indiana Supreme Court held that the preemption clause of the Safety Act forecloses any possibility of implied preemption.¹³² Moreover, the court concluded that even if it were to apply the principles of implied preemption,¹³³ it would be improper to imply preemption to the facts of the case.¹³⁴

U.S.C. § 1381 (1988)).

124. 49 C.F.R. § 571.208 S4.1.2.1-S4.1.2.3 (1994).

125. *Wilson*, 660 N.E.2d at 329.

126. *Id.* (quoting 49 C.F.R. § 571.208).

127. *Wilson*, 660 N.E.2d at 329.

128. *Id.* at 330.

129. *Id.* (quoting 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b) (1994))).

130. *Id.* at 329 (quoting 15 U.S.C. § 1397(k) (1988) (current version at 49 U.S.C. § 30103(e) (1994))).

131. *Id.* at 329-36.

132. *Id.* at 336.

133. An implied preemption analysis was performed due to the unsettled nature of the law. *See id.*

134. *Id.* at 339. The court concluded that there existed no conflict between state common law in the case at bar and the choices presented by Rule 208 because state law did not stand as an obstacle to the execution of the purposes of the federal law. *Id.* Because the scope of preemption is a matter of federal law, defendants would be well-advised to remove cases to federal court if possible. The federal courts are not bound by *Wilson*.

B. The Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act Preempts Many State Law Claims

In *Mitchell v. Collagen Corp.*,¹³⁵ Barbara Mitchell received several injections of collagen-based products used to correct skin tissue anomalies such as wrinkles. Following her injections in 1988, Mitchell developed serious medical complications. In 1993, she and her husband filed suit against Collagen in Indiana state court. The lawsuit included counts sounding in strict liability, negligence, fraud, mislabeling, misbranding, adulteration, and breach of warranty. After the case was removed to federal court, the Mitchells moved to amend their complaint to add a claim under Indiana's Deceptive Consumer Sales Act.¹³⁶ Collagen filed for summary judgment on the ground that the Mitchells' claims were preempted by federal law.

The district court denied the Mitchells' motion for leave to amend based on the amendment's futility because their claim was time barred. The court then determined that the Mitchells' remaining state law claims were preempted by the Medical Device Amendments of 1976¹³⁷ (MDA) to the federal Food, Drug, and Cosmetic Act.¹³⁸

On appeal, the Seventh Circuit noted that, under the Supremacy Clause, the "Laws of the United States . . . shall be the supreme Law of the Land."¹³⁹ Pursuant to this authority, Congress may preempt state law.¹⁴⁰ Whether federal law preempts a state law establishing a cause of action is a question of congressional intent.¹⁴¹ If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause.¹⁴² The existence of an express preemption clause supports an inference that Congress intended to limit the federal statute's preemptive scope to the express terms of the clause. But the existence of an express clause does not entirely foreclose the possibility of implied preemption.¹⁴³ Preemption is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in the statute's structure and purpose.¹⁴⁴

The *Mitchell* court noted that the MDA contains an express preemption provision at 21 U.S.C. § 360k(a), which provides:

[N]o State or political subdivision of a State may establish or continue in

135. 67 F.3d 1268 (7th Cir. 1995), *vacated*, 116 S. Ct. 2576 (1996). The Supreme Court remanded this case for reconsideration in light of *Medtronic v. Lohr*, 116 S. Ct. 2240 (1996).

136. IND. CODE §§ 24-5-0.5-1 to -10 (1993 & Supp. 1996).

137. Pub. L. No. 94-295, 90 Stat. 539 (codified as amended at 21 U.S.C. §§ 360c-360k, 379, 379a (1994)).

138. 21 U.S.C. §§ 301-395 (1994 & Supp. I 1995).

139. *Mitchell*, 67 F.3d at 1274 (citing U.S. CONST. art. VI, cl. 2).

140. *Id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.* at 1274-75.

effect with respect to a device intended for human use any requirement— (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.¹⁴⁵

The court held that this language is broad enough to include some state common law causes of action.¹⁴⁶ “This view is buttressed by an FDA [Food and Drug Administration] regulation that interprets the statute’s preemptive sweep as encompassing state requirements established by ‘statute, ordinance, regulation, or court decision.’”¹⁴⁷ Indeed, the court noted that every circuit considering the question had concluded that the MDA’s preemption clause preempts at least some common law causes of action.¹⁴⁸ Therefore, the court explicitly held that “[t]he phrase ‘any requirement’ in 21 U.S.C. § 360k(a) is broad enough to include at least some common law causes of action within the statute’s preemptive scope.”¹⁴⁹

Next, the *Mitchell* court undertook the task of determining the precise scope of the MDA’s preemption provision. The court held that the breadth of the language in § 360k(a) expressly preempts claims relating not only to “safety and effectiveness,” but also to “any other matter included in a requirement.”¹⁵⁰ Therefore, the section “encompasses state law claims that add requirements ‘different from, or in addition to,’ any requirement set forth in the MDA.”¹⁵¹

The plaintiffs contended that their common law causes of action survived preemption because the FDA had not established “specific requirements” with respect to the particular product used by the plaintiff as required by regulation.¹⁵² Collagen responded that the detailed premarket approval process required for the “Class III” product at issue constitutes a “specific requirement.” Therefore, any state laws that seek to add requirements different from or in addition to the premarket approval process are preempted under the MDA.

The Seventh Circuit agreed that the FDA’s premarket approval process constitutes a “specific requirement.”¹⁵³ “In doing so, we align ourselves with the majority of circuits to have considered this question,” reasoned the court.¹⁵⁴ Consequently, the plaintiffs’ strict liability and negligence claims were found to be preempted: “[W]ith respect to a Class III device that has undergone the [premarket approval] process, such claims are preempted because they undoubtedly would add requirements ‘different from, or in addition to,’ those set

145. *Id.* at 1275 (citing 21 U.S.C. § 360k(a) (1994)).

146. *Id.* at 1276.

147. *Id.* at 1275-76 (quoting 21 C.F.R. § 808.1(b) (1995)).

148. *Id.* at 1276.

149. *Id.*

150. *Id.* at 1278.

151. *Id.* (citations omitted).

152. 21 C.F.R. § 808.1(d) (1996).

153. *Mitchell*, 67 F.3d at 1279.

154. *Id.*

forth in the MDA.”¹⁵⁵ Likewise, the plaintiffs’ claims for mislabeling, misbranding, and adulteration were found to be preempted,¹⁵⁶ as were their claims for fraud, misrepresentation, breach of implied warranty.¹⁵⁷ Although a breach of express warranty claim would not be preempted by the MDA, the plaintiffs failed to demonstrate a genuine issue of material fact on that theory.¹⁵⁸

X. COLLATERAL ESTOPPEL

A. *Former Employee as Expert Witness in Products Case*

In *Hayworth v. Schilli Leasing, Inc.*,¹⁵⁹ the Indiana Supreme Court considered an interlocutory appeal challenging the trial court’s order enjoining a defendant’s former employee from consulting with, or providing trial or deposition testimony on behalf of, the plaintiff in a wrongful death product liability case.

The plaintiff filed a wrongful death action against Fruehauf Corporation after her husband was killed in a work-related accident involving a dump trailer manufactured by Fruehauf. During pre-trial investigation and discovery, the plaintiff retained a registered professional engineer, as an expert witness. The expert had been employed as an engineer by Fruehauf from 1965 until his retirement in 1982. He had testified on behalf of Fruehauf in thirteen or fourteen lawsuits. He thereafter formed his own consulting corporation, providing technical advise and expert testimony to plaintiffs’ attorneys in product liability litigation.

On the day before the expert was to be deposed by one of Fruehauf’s co-defendants, Fruehauf asked the trial court to enjoin the expert from consulting with or testifying for any person or attorney participating in the litigation. The trial court ordered the expert deposition stayed pending resolution of Fruehauf’s motion. Fruehauf then initiated an action against the expert in a Michigan state court, seeking injunctive relief to prevent him from acting as an expert witness or consultant in any litigation brought by any plaintiff against Fruehauf. The Michigan court denied Fruehauf’s motion for preliminary injunction and dismissed the petition for permanent injunction. The trial court was subsequently affirmed by the Michigan Court of Appeals. Notwithstanding Michigan’s rejection of Fruehauf’s efforts to prohibit the expert’s participation in litigation, the Indiana trial court granted Fruehauf’s motion to enjoin the expert’s participation in the present case.

The Indiana Supreme Court first addressed plaintiff’s contention that the injunction was erroneous because collateral estoppel operated to bar Fruehauf from relitigating an issue that had previously been resolved by the Michigan state court. The court noted that “[c]ollateral estoppel generally ‘operates to bar a

155. *Id.* at 1280 (citation omitted).

156. *Id.* at 1281.

157. *Id.* at 1283.

158. *Id.*

159. 669 N.E.2d 165 (Ind. 1996).

subsequent relitigation of the same fact or issue where that fact or issue is necessarily adjudicated in a former suit and the same fact or issue is presented in the subsequent lawsuit.”¹⁶⁰

A trial court must consider two factors in determining whether to apply collateral estoppel: whether the party against whom the judgment obtained had a full and fair opportunity to litigate the issue, and whether it would be otherwise unfair under the circumstances of the particular case to apply collateral estoppel.¹⁶¹

This two-part test applies to both the defensive and offensive use of collateral estoppel. However, the offensive use of collateral estoppel may pose “particular risks of unfairness” while the defensive use of collateral estoppel is “more likely to promote judicial economy.”¹⁶²

The Indiana Supreme Court found that collateral estoppel did not operate to entirely foreclose Fruehauf’s request for injunctive relief in the Indiana court because Fruehauf’s requested injunction in Indiana covered issues that were not litigated in the Michigan proceedings, including issues of trade secrets, confidential information, and work product.¹⁶³ The Indiana trial court enjoined the expert from testifying in the action and from consulting or discussing with any party Fruehauf’s trade secrets, confidential information, and matters of attorney-client privilege or work product. On the other hand, the Michigan court was asked to enjoin the expert from discussing with anyone any information related to Fruehauf and from consulting or testifying as an expert in any products liability case brought against Fruehauf under the rationale that the expert’s consultation and expert services allegedly violated the attorney-client privilege. The Michigan ruling did not encompass issues of trade secrets, confidential information, or work product.¹⁶⁴

The Indiana Supreme Court’s decision in this case may be open to criticism. First, the opinion omits any reference to the Full Faith and Credit Clause¹⁶⁵ which is supposed to control the outcome of this case. The Indiana Supreme Court was bound to give the Michigan judgment the same effect as it would have in Michigan.¹⁶⁶ The decision also fails to mention Michigan law concerning the *res judicata* effect of Michigan judgments.

The court also did not evaluate whether issue preclusion or claim preclusion

160. *Id.* at 167 (quoting *Sullivan v. American Cas. Co.*, 605 N.E.2d 134, 137 (Ind. 1992)).

161. *Id.* (citing *Tofany v. NBS Engine Sys., Inc.*, 616 N.E.2d 1034, 1038 (Ind. 1992)).

162. *Id.* at 168 (citing *Tofany*, 616 N.E.2d at 1038).

163. *Id.*

164. *See id.*

165. U.S. CONST. art. IV, § 1.

166. *See Durfee v. Duke*, 375 U.S. 106, 109 (1963) (“Full faith and credit thus generally requires every state to give a judgment at least the *res judicata* effect which the judgment would be accorded in the state which rendered it.”). *See also Conglis v. Radcliffe*, 889 P.2d 1209 (N.M. 1995).

applied to this case.¹⁶⁷ Almost certainly, claim preclusion applied here. Fruehauf requested in the Michigan action that the expert be enjoined from participating in all litigation involving Fruehauf. That request was denied, and the denial was affirmed on appeal. That the Michigan court did not discuss certain issues¹⁶⁸ is not dispositive.

The operation of claim preclusion is not predicated on whether the court rendering the judgment “discussed the issues” or even whether the party raised them.¹⁶⁹ Fruehauf sought a broad order barring the expert from participating in all proceedings against it. It failed. Fruehauf could have limited the scope of its claim in the Michigan court to the pending litigation in Indiana. It did not. Had Fruehauf’s claim succeeded in Michigan, the expert could not have testified in the Indiana action. Fruehauf was then permitted to relitigate in the Indiana court whether the expert could testify in the Indiana action. The doctrine of claim preclusion was meant to prevent such a result.

B. The Use of Offensive Collateral Estoppel to Prove Design Defect

In *Rogers v. Ford Motor Co.*,¹⁷⁰ the court considered whether the plaintiffs were entitled to partial summary judgment under the theory that the defective design of the seatbelt in their Lincoln Town Car (known in the automotive industry as a “Type I” buckle) was conclusively adjudicated by a California plaintiffs’ verdict. In the California case, the jury returned a special verdict finding that the design of the seatbelt in the subject automobile was defective at the time it left the seatbelt manufacturer’s control. Accordingly, the plaintiffs in *Rogers* argued that the seatbelt manufacturer should be collaterally estopped from relitigating the issue of the seatbelt’s defectiveness.

The court noted that “collateral estoppel is termed ‘offensive’ when . . . ‘[the] plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.’”¹⁷¹ The court also noted that the question whether the device of offensive collateral estoppel should be allowed is within the trial court’s discretion.¹⁷²

According to the in *Rogers* court, the defendant presented convincing evidence that the second threshold requirement—an identity of issues—was not present.¹⁷³ There was a substantial question whether the seatbelt buckle found to be defectively designed in the California case and alleged to have failed in the *Rogers*’ vehicle presented an identity of issues for purposes of collateral estoppel.¹⁷⁴ Although the plaintiff’s expert stated in his affidavit that the seatbelt

167. See RESTATEMENT (SECOND) JUDGMENTS §§ 19, 27 (1982).

168. *Hayworth*, 669 N.E.2d at 168.

169. RESTATEMENT (SECOND) JUDGMENTS § 24 (1982).

170. 925 F. Supp. 1413 (N.D. Ind. 1996).

171. *Id.* at 1418 (quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.4 (1979)).

172. *Id.*

173. *Id.*

174. *Id.*

buckle in the Rogers' 1988 Lincoln was designed identically to that in the California plaintiff's 1987 Ford Bronco II, the affidavit of the defense expert provided "sworn testimony that the two buckles were manufactured and assembled largely from different components with distinct part numbers and dissimilar weights."¹⁷⁵

Besides the lack of issue identity, the plaintiffs in *Rogers* faced an additional impediment to the use of collateral estoppel. The court held that collateral estoppel should not be used to preclude relitigation of the issue of defective design related to mass-produced products where injuries arise out of distinct incidents.¹⁷⁶ Here, the incidents in the California case and the present action were found to be sufficiently distinguishable to foreclose the use of collateral estoppel.¹⁷⁷ The California case involved a fatal, seven-car accident in which the driver was ejected through the sunroof when the vehicle rolled over two or three times. In *Rogers*, the plaintiffs claimed that the passenger-side seatbelt failed when their car sustained a driver's side impact in the collision with another vehicle.

The conclusion in a prior proceeding that the product failed due to defective design necessarily rests upon the determination that the design was inadequate to withstand specific, foreseeable circumstances of the incident. It does not automatically follow that the product would fail due to defective design in a different *type* of incident, where the forces acting upon the product may have been distinct from those in the earlier litigated incident (and possibly unforeseeable).¹⁷⁸

The *Rogers* court articulated an additional reason for prohibiting the use of collateral estoppel under the circumstances presented. After the California verdict, the National Highway Traffic Safety Administration announced that an exhaustive investigation revealed no basis for the allegation that "Type I" seatbelt buckles were subject to inadvertent release during roll-over vehicle crashes. "Confidence in the correctness of the earlier determination is fundamental to the principles of collateral estoppel, based at least in part upon a conviction that, even if the issue were relitigated, the result would not change."¹⁷⁹ Because confidence in the California verdict was undermined by the existence of additional evidence on the safety of the seatbelt, the use of collateral estoppel in *Rogers* was found to be inappropriate.¹⁸⁰

XI. PUNITIVE DAMAGES FOR DESIGN DEFECT

During this survey period, the District Court for the Southern District of Indiana refused to prohibit a potentially duplicative punitive damage award in a

175. *Id.*

176. *Id.* at 1419.

177. *Id.*

178. *Id.* (citations omitted).

179. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982)).

180. *Id.* at 1418.

design defect case against Ford Motor Company. In *Greco v. Ford Motor Co.*,¹⁸¹ Ford argued that the plaintiff's punitive damages claim should be summarily resolved because such would be duplicative of prior punitive sanctions assessed by the courts of Indiana against Ford and would therefore violate the Due Process Clause of the Fourteenth Amendment and Article I of the Indiana Constitution. Prior to *Greco*, a Marion County jury yielded a \$58,000,000 punitive damages award against Ford for its design of the Bronco II line,¹⁸² which Ford claimed to be sufficient punishment and deterrence for the Bronco II's shortcomings. Ford also contended that additional punitive damages in Indiana would be contrary to due process. Although the court found this argument intriguing, Ford's position was ultimately rejected.¹⁸³ The court noted that, although Ford no longer manufactures the Bronco II, Ford and other automobile producers continue to manufacture sports utility and other vehicles.¹⁸⁴ The court could not declare as a matter of law that further deterrence was unnecessary simply because Ford was once punished for its "now defunct Bronco II line."¹⁸⁵ The question "[w]hether Ford needs to be dissuaded from defective engineering in this case or otherwise additionally punished is a first question for the jury."¹⁸⁶

181. 937 F. Supp. 810 (S.D. Ind. 1996).

182. *See id.* at 816.

183. *Id.* at 817.

184. *Id.*

185. *Id.*

186. *Id.*

SURVEY OF 1996 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

During 1996, the law of professional responsibility in Indiana developed significantly on two fronts; through reported decisions from Indiana courts and through amendments to the written rules governing both lawyers and disciplinary action. This evolution affects every practicing member of the Indiana bar to some degree and forces increased attention on ethics issues in daily practice. At the same time, the shifting landscape of the law, with expected developments in 1997, will again cause lawyers to devote even more energy on both legal duties and professional responsibility issues.

As in prior years, a steady flow of opinions from the Indiana Supreme Court further defined the boundaries of wrongful conduct and fleshed out Indiana's *Rules of Professional Conduct for Attorneys at Law*. This Article will highlight many of those decisions in an attempt to explain their role in the context of Indiana lawyer discipline. These decisions cover such diverse topics as jurisdiction in pro hac vice admissions, the reasonableness of fees, and lawyer solicitation. Comprehensive treatment of all the reported decisions involving ethics issues of interest to lawyers would be too large for any survey work to treat adequately. Representative cases, therefore, have been selected to illustrate changes to the law or reaffirmation of existing principles.

On another front, rules controlling some aspects of law office management and the disciplinary process have been changed by the Indiana Supreme Court to reflect new thinking regarding the practice of law. For example, the disciplinary process is now more open than ever before, with the lay public becoming increasingly involved. Regulation of client trust accounts was also changed to require greater attention by both the lawyers who maintain these accounts and the Indiana Supreme Court Disciplinary Commission. These regulatory changes herald even more changes on the horizon. To the extent practicable, this survey attempts to explain the significance of these changes and their scope as future changes take place. The groundwork is in place for dramatic changes in the way lawyers account for their stewardship of others' property.

The one observation which might serve as the leitmotif for any examination of this past year is that the Indiana Supreme Court is spending considerable time and energy dealing with professional responsibility issues. More accurately, the court is very active in developing ways to raise, as a whole, the ethics level of the bar. Although this same observation could be made for the high courts of other states, the reader would be well advised to note that Indiana's Supreme Court is

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comparatively very active in its modernization of this body of law.

I. SYNOPSIS OF LAWYER DISCIPLINE CASES

A. *Neglect of Client Matters*

Far and away, the most common misconduct dealt with in disciplinary actions is a lawyer's failure to exercise reasonable diligence in pursuing matters with which clients entrust them.¹ This lack of diligence is usually accompanied by a breakdown in communication between the lawyer and the client. This occurs even though the lawyer has a duty to keep the client informed.² In addition, there are a smattering of other rule violations often associated with these cases of neglect. For example, the respondent lawyers in some cases misrepresent the status of matters to their clients in an attempt to buy additional time to conceal their neglect.³ A neglected matter pending in court can also cause needless court involvement through additional proceedings. This usually results from an opponent's attempt to either process the case or dispose of it.⁴ The end result is something akin to a "death spiral." The spiral can be described as starting with inattention to the file, followed by a refusal to talk with the client, followed by misrepresentations to the client about the status of the case and ending with some permanent injury to the client's rights. Almost invariably, neglect cases involve prejudice to the rights of multiple clients and end in lengthy disciplinary opinions by the Indiana Supreme Court. Problems in the lawyer's personal life is another recurring theme in these cases.⁵ The following cases illustrate the need for lawyers to either prosecute their client's claims or, discontinue the representation.

The case of *In re Weybright*⁶ originally began with a complaint from the Disciplinary Commission in eleven counts. Ultimately, the Indiana Supreme Court found that Weybright committed the misconduct charged in ten of the eleven counts.⁷ Each count shared the essential common characteristic wherein the lawyer undertook representations for clients in family law related matters.

1. "A lawyer shall act with reasonable diligence and promptness in representing a client."
IND. R. PROF. COND. 1.3.

2.

"(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

IND. R. PROF. COND. 1.4.

3. "It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ." IND. R. PROF. COND. 8.4(c).

4. "It is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice . . ." IND. R. PROF. COND. 8.4(d).

5. See *In re Schreiber*, 632 N.E.2d 362, 364-65 (Ind. 1994).

6. 656 N.E.2d 1142 (Ind. 1995).

7. *Id.* at 1143-44.

Thereafter, she failed to take action on behalf of her clients and did not respond to their inquiries. As a result of her inaction, her clients' interests were prejudiced. The supreme court found that Weybright failed to act diligently⁸ in violation of Indiana Rule of Professional Conduct 1.3.⁹ Furthermore, the court ruled that Weybright violated Indiana Rule of Professional Conduct 1.4¹⁰ by failing to respond to reasonable requests for information or to explain the matter in such a way as to permit the client to make informed decisions.¹¹ The court also found that Weybright failed to protect her clients' interests upon termination of the representation¹² in violation of Indiana Rule of Professional Conduct 1.16(d).¹³ Weybright received a three-year suspension for neglect of multiple client matters and related charges.¹⁴

In another case, a six count complaint was filed against a lawyer who, in essence, abandoned her practice without making any alternate provisions for her clients.¹⁵ The Indiana Supreme Court found various violations of Professional Conduct Rules 1.1¹⁶ (not acting with competence),¹⁷ 1.2(a)¹⁸ (failing to abide by the client's decisions concerning the objectives of the representation),¹⁹ 1.3²⁰

8. *Id.* at 1145.

9. *See supra* note 1.

10. *See supra* note 2.

11. *Weybright*, 656 N.E.2d at 1144-45.

12. *Id.* at 1145.

13.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

IND. R. PROF. COND. 1.16(d).

14. *Weybright*, 656 N.E.2d at 1145.

15. *In re Cox*, 662 N.E.2d 635 (Ind. 1996).

16. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." IND. R. PROF. COND. 1.1.

17. *Cox*, 662 N.E.2d at 636.

18.

A lawyer shall abide by a client's decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

IND. R. PROF. COND. 1.2(a).

19. *Cox*, 662 N.E.2d at 637.

20. *See supra* note 1.

(failing to act diligently),²¹ 1.4²² (failing to keep her clients informed),²³ and 8.4(c)²⁴ (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).²⁵ For her misconduct, the lawyer was suspended for twelve months.²⁶

The Indiana Supreme Court also dealt with a four count disciplinary action in the case of *In re Kelly*.²⁷ In each count, the lawyer was charged with violating the rule governing neglect of an entrusted matter.²⁸ In three of the four counts, he was also charged with failure to communicate with his clients and a failure to respond to reasonable requests for information.²⁹ This opinion provides a good illustration of a general neglect case. The neglected matters involved (1) an "on-the-job" injury claim, (2) a guardianship matter, (3) a marriage dissolution action and (4) a medical malpractice action pending before the Indiana Department of Insurance. In the medical malpractice action, after several failures to timely comply with discovery, the defendants filed a motion that resulted in dismissal of the plaintiff's case with prejudice.³⁰ The respondent lawyer refused to communicate with the client and the client, through independent investigation, discovered the dismissal.³¹ For misconduct as to all four counts, the respondent lawyer was suspended for eighteen months.³²

These are, by no means, the only cases of this type. During the survey period, more than a dozen opinions³³ involving neglect were handed down by the Indiana Supreme Court. The court is particularly sensitive to this issue and is cognizant of the Comment to the Rule:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may

21. *Cox*, 662 N.E.2d at 635-38 (five counts).

22. *See supra* note 2.

23. *Cox*, 662 N.E.2d at 635-38 (all six counts).

24. *See supra* note 3.

25. *Cox*, 662 N.E.2d at 636.

26. *Id.* at 638.

27. 655 N.E.2d 1220 (Ind. 1995).

28. *See supra* note 1.

29. *See supra* note 2.

30. *See Kelly*, 655 N.E.2d at 1222-23.

31. *Id.* at 1223.

32. *See id.*

33. Some representative cases include: *In re Sexson*, 666 N.E.2d 402 (Ind. 1996) (neglect of a capital case resulted in a six month suspension); *In re Clifford*, 665 N.E.2d 907 (Ind. 1996) (four year neglect of an estate resulted in a thirty day suspension); *In re Woods*, 660 N.E.2d 340 (Ind. 1996) (four neglected matters, coupled with prior disciplinary action, resulted in an eighteen month suspension); *In re Kern*, 655 N.E.2d 339 (Ind. 1995) (six month delay in making a lien payment out of personal injury settlement proceeds resulted in a public reprimand).

be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.³⁴

B. Conflicts of Interest

Conflict of interest cases are often difficult to identify and analyze for both the practicing lawyer and disciplinary counsel. Several provisions in the Indiana Rules of Professional Conduct address many different situations in which conflicts can arise.³⁵ The conflict of interest rules appearing most often are Rules 1.7³⁶ and 1.9.³⁷ These rules prohibit a lawyer's representation of a client if that representation would conflict with the interests of another client (Rule 1.7(a)), the lawyer's interests (Rule 1.7(b)) or the interests of former clients (Rule 1.9). During the survey period, the Indiana Supreme Court handed down opinions in disciplinary actions which provide good examples of prohibited conduct in

34. IND. R. PROF. COND. 1.3 cmt.

35. IND. R. PROF. COND. 1.7 (the general rule); 1.8 (identifying specific prohibited transactions between lawyer and client); 1.9 (conflicts involving former clients); 1.10 (imputed disqualification of other members of a law firm when a conflict of interest arises); 1.11 and 1.12 (regarding former government lawyers, judges and arbitrators); 1.13 (governing situations in which an organization is a client); 2.2 (the lawyer as an intermediary between clients); and 2.3 (situations in which the lawyer makes an evaluation for third persons that may affect a client's interests).

36.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

IND. R. PROF. COND. 1.7.

37.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

IND. R. PROF. COND. 1.9.

relation to each of these rules.

The lawyer in the case of *In re Horine*³⁸ represented a client in a bankruptcy proceeding. During the course of this representation, Horine entered into a contract with the client wherein the client agreed to purchase a car from him. In reality, the lawyer did not own the car but was selling it on behalf of an undisclosed client. After the emergence of a dispute, the true nature of the transaction became known. The lawyer was held to have violated Rule 1.7,³⁹ because he simultaneously represented two clients having adverse interests.⁴⁰ The court found that he also violated Rule 1.8(a),⁴¹ because he entered into a business transaction with a client without advising the client to seek independent legal advice or getting the client's consent to the conflict of interest in writing.⁴² As a result of these violations, the lawyer received a public reprimand.⁴³

Two separate disciplinary actions were reported under the decision of *In re Anonymous*.⁴⁴ In the first action, a company retained the respondent lawyer to represent it in connection with certain labor union grievances. A key witness to the dispute was a union officer who had negotiated the collective bargaining agreement between the union and the company. He gave testimony adverse to the union's position and thereafter lost his union office. The witness then met with a second attorney in the respondent lawyer's law firm to discuss representation in a suit against the union. The witness was referred to the respondent lawyer to discuss aspects of the pending dispute between the company and the union. They also discussed the witness' termination from his union office and possible legal claims the witness might have against the union.

At the second lawyer's direction, the firm opened a client file in the witness' name. Thereafter, there were meetings and letters between the respondent lawyer and the witness. Some of these communications related to the witness' discharge from his union office. The second lawyer and the witness never agreed on a plan of action against the union for the witness' loss of office. Moreover, the lawyer's firm never billed the witness for legal fees. Thereafter, the respondent lawyer

38. 661 N.E.2d 1206 (Ind. 1996).

39. See *supra* note 36.

40. *Horine*, 661 N.E.2d at 1207.

41.

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction, and

(3) the client consents in writing thereto.

IND. R. PROF. COND. 1.8(a).

42. *Horine*, 661 N.E.2d at 1207.

43. *Id.* at 1208.

44. 655 N.E.2d 67 (Ind. 1995).

changed law firms and represented the company in a fraud action against several individuals, including the witness. The fraud action was directly related to the subject matter of the earlier dispute between the company and the union.

The primary issue before the supreme court in the disciplinary action was whether an attorney-client relationship had been formed between the respondent and the witness. The lawyer maintained that his relationship to the witness was only as a witness to the dispute between the company and the union. The court found that an attorney-client relationship can be implied by the conduct of the parties in the absence of an express agreement.⁴⁵ "An important factor is the putative client's subjective belief that he is consulting a lawyer in his professional capacity and on his intent to seek professional advice."⁴⁶

In the second action, the respondent lawyer represented a client briefly in a personal injury matter. After an initial consultation with the client and before the lawyer took further action on behalf of the client, the client discharged the lawyer and hired new counsel. Four years later, the client sued the successor lawyer for malpractice. The successor counsel's insurance carrier retained the respondent lawyer to defend against the malpractice claim. Although the respondent lawyer disclosed his prior representation of the client and obtained consent from the successor counsel, he did not seek similar consent from his former client. The Indiana Supreme Court concluded that both lawyers violated Rule 1.9(a)⁴⁷ by undertaking representations adverse to the interests of former clients in the same or a substantially related matter.⁴⁸ Each of the lawyers received private reprimands.⁴⁹

C. The Jurisdiction of the Supreme Court

The extent of the supreme court's original jurisdiction is spelled out in the Indianas Constitution.⁵⁰ The first two powers granted the court are the ability to admit and discipline attorneys. The court has undertaken these tasks for more than

45. *Id.* at 70.

46. *Id.*

47. *See supra* note 37.

48. *Anonymous*, 655 N.E.2d at 72.

49. *Id.*

50. The Indiana Supreme Court is a court of limited original jurisdiction:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than fifty years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

IND. CONST. art. VII, § 4.

a century,⁵¹ and its powers in this area are plenary.⁵² In addition to its constitutional grant, the court has, through the years, created, promulgated and amended the Indiana Rules for Admission to the Bar and the Discipline of Attorneys. These rules assist the Indiana Supreme Court in the exercise of its jurisdictional grant under Indiana's constitution. The rules create a variety of agencies, including the State Board of Law Examiners, the Disciplinary Commission of the Supreme Court of Indiana and the Indiana Commission for Continuing Legal Education. Virtually all facets regarding the admission of lawyers to the bar, standards of practice for lawyers and judges and disciplinary actions associated therewith are governed under these rules.

Admission and Discipline Rule 3 governs the admission of non-Indiana (or "foreign") attorneys on a pro hac vice basis.⁵³ Admission of out-of-state lawyers on a pro hac vice basis is commonly viewed as a process dealt with exclusively at the trial court level. However, during the survey period, the Indiana Supreme Court addressed a disciplinary action brought against a lawyer admitted on a pro hac vice basis. In the case of *In re Fletcher*,⁵⁴ the respondent lawyer's regular practice was located in Illinois, where he was admitted to practice law. Fletcher participated, however, in the trial of an Indiana case and practiced before an Indiana court on a pro hac vice basis. The Disciplinary Commission filed an action charging the lawyer with knowingly making false statements of material fact to the trial court. Claiming the Indiana Supreme Court lacked jurisdiction over him, Fletcher moved to dismiss the disciplinary action. The court, relying on

51. See *McCracken v. State*, 27 Ind. 491 (Ind. 1867) (court upheld law prohibiting county recorders from practicing law). "There are burdens that could not be imposed by [state] law even on an officer [of the court], but the one in question does not belong to that class." *Id.* at 492.

52. See *State ex rel. Western Parks, Inc. v. Bartholomew County Court*, 383 N.E.2d 290 (Ind. 1978). The court, commenting on its authority under the state constitution, held:

The Indiana Constitution gives this Court original jurisdiction to determine the qualifications for admissions and practice of law. This function is judicial and separate from the legislative or executive domain. Pursuant to the grant of jurisdiction, this Court has promulgated numerous rules which govern the qualifications and conditions precedent to the practice of law in the Indiana courts. To the extent that any legislative enactment conflicts with these rules, the rules must take precedence and the conflicting phrases within that statute must be deemed without force or effect.

Id. at 292 (citations omitted).

53. In relevant part, IND. ADMIS. DISC. R. 3 provides:

A member of the Bar of another state or territory of the United States, or District of Columbia, may appear, in the trial court's sole discretion, in Indiana trial courts in any particular proceeding for temporary period so long as said attorney appears with local Indiana counsel after petitioning the trial court for the courtesy and disclosing in said petition all pending causes in Indiana in which said attorney has been permitted to appear. Local counsel shall sign all briefs, papers and pleadings in such cause and shall be jointly responsible therefor.

54. 655 N.E.2d 58 (Ind. 1995).

article 7, section 4 of the Indiana Constitution,⁵⁵ held that it is within the province of the supreme court to regulate the practice of law in Indiana.⁵⁶ The court further concluded that a pro hac vice admission “bears with it the obligation to subject oneself to the full panoply of Indiana court rules, including those involving professional conduct and discipline.”⁵⁷ The court acknowledged that some of the usual sanctions in lawyer discipline cases were not appropriate for an out-of-state lawyer.⁵⁸ The court went on to suggest that other sanctions may be appropriate, including “vacating existing pro hac vice admissions, prohibiting future pro hac vice admissions, injunctive relief under Admis.Disc.R. 24,⁵⁹ and costs.”⁶⁰ The *Fletcher* case serves as a good example of the broad scope of the Indiana Supreme Court’s jurisdiction in regulating the practice of law and, simultaneously, the court’s ability to regulate the unauthorized practice of law.

D. Attorney Fees

In 1996, the Indiana Supreme Court decided several cases involving attorney fees. Most notably, the court addressed the following issues: 1) whether the fee charged was reasonable under the circumstances, 2) how lawyers should bill against monies denominated as a “retainer,” 3) calculating fees where the recovery proceeds are paid over a period of time, and 4) contingent fee contracts where the amount of fees are fixed by statute.

The case of *In re Sexson*⁶¹ involves a lawyer who served as appointed counsel at trial and on appeal in a death penalty case. After multiple delays, the respondent lawyer filed a twenty page appellate brief that was deemed “woefully inadequate” by the Indiana Supreme Court.⁶² The lawyer billed the county for 558.8 hours in connection with the appeal and was paid \$40,743.50 for services rendered. In addition, he billed the county an additional \$13,097 for 187.1 hours of work on the appeal for which he had not been paid. The court found the lawyer violated Rule 1.5(a).⁶³ For this and other violations, the respondent lawyer was

55. See *supra* note 50.

56. *Fletcher*, 655 N.E.2d at 59-60.

57. *Id.* at 60.

58. *Id.* at 61.

59. IND. ADMIS. DISC. R. 24. This particular rule has essentially remained in its original form as adopted in 1952. The full text of the rule is somewhat lengthy, but it establishes that the preferred remedy under the rule is injunctive relief. The rule also identifies the entities having concurrent jurisdiction to initiate and prosecute a claim for the unauthorized practice of law.

60. *Fletcher*, 655 N.E.2d at 61 (footnotes omitted).

61. 666 N.E.2d 402 (Ind. 1996).

62. *Id.* at 403.

63. *Id.*

A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of the fee include the following:

(1) the time and labor required, the novelty of the questions involved, and the skill requisite to perform the legal service properly;

suspended for six months with automatic reinstatement of his license.⁶⁴

Another lawyer received a thirty day suspension for charging an unreasonable fee in the case of *In re Comstock*.⁶⁵ In the underlying representation, the client paid the lawyer a retainer of \$7500 because the client was afraid he was about to become the subject of a criminal prosecution. The client also hired the lawyer to represent his interests in a civil matter pending at that time. The lawyer was to bill against the retainer at a rate of \$100 per hour. In this case, the lawyer made two telephone calls to verify that no criminal charges were contemplated against his client. The length of the calls totaled four tenths of an hour.

After putting in some time on the client's civil matter, the respondent lawyer traveled to California on personal business. While in California, the lawyer billed against the retainer for traveling six hours on each of three days to a law library. He claimed research was done attributable to his client's case. While the lawyer was in California, the client wrote both to the lawyer's Indiana law office and to the lawyer personally in California. The purpose of the letters was to discharge the respondent. Even after notice of the discharge was received, the lawyer continued to do work and bill against the retainer. When the lawyer issued his final bill, he deemed the \$7500 retainer as having been earned in its entirety simply in verifying that his client was facing no criminal charges. As with the *Sexson* matter, the court found that this lawyer's fee was unreasonable.⁶⁶ The supreme court also found the respondent lawyer in *Comstock* to have violated Rule 1.16(d)⁶⁷ by failing to return an unearned fee upon termination of the representation.⁶⁸

A somewhat more unusual fee problem is presented in the case of *In re Myers*.⁶⁹ In this case, several members of a family hired the respondent lawyer to represent them in an attempt to recover money they paid into a questionable investment scheme. The lawyer and his clients entered into a contingency fee agreement in which the lawyer would be paid ten percent of the gross recovery of his clients' investment. The case was promptly settled with the investment

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- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.

IND. R. PROF. COND. 1.5(a).

64. *Sexson*, 666 N.E.2d at 404.

65. 664 N.E.2d 1165 (Ind. 1996).

66. *Id.* at 1168. See also *supra* note 63.

67. See *supra* note 13.

68. *Comstock*, 664 N.E.2d at 1168.

69. 663 N.E.2d 771 (Ind. 1996).

company for a refund of the original investment plus interest. The settlement was structured so that the first two payments were for \$50,000 each and thirty subsequent payments of \$15,000 each. This led to a total settlement payout of \$550,000.

The respondent lawyer took his fee of \$50,000 out of the first two payments. Thereafter, the principal of the investment company defaulted after paying only \$160,000. The clients received a total of \$110,000 which left an uncollectible balance of \$390,000 on the settlement. The clients filed a complaint with their local bar association's fee dispute committee. That body issued a non-binding decision that, pursuant to their contingent fee agreement, the lawyer was only entitled to ten percent of the monies recovered. The bar association urged the lawyer to return \$35,500 to the clients, which he declined to do.

The Indiana Supreme Court imposed a public reprimand on the lawyer and found that he had violated Rule 1.5(a)⁷⁰ by taking an unreasonable fee.⁷¹ The court also agreed with the tendered stipulation of the parties that the term "recovery," as used in the fee agreement, meant the actual receipt of funds.⁷² Furthermore, the court acknowledged precedent from other jurisdictions holding that any ambiguities in a contingency fee agreement should be construed against the lawyer.⁷³ The court also found the lawyer violated Rule 1.5(c)⁷⁴ regarding the formalities associated with settling a contingent fee representation.⁷⁵ In this violation, the lawyer neglected to provide a written settlement statement to his client at the time of settlement.

The Indiana Supreme Court further addressed the subject of contingent fee representations in the case of *In re Anonymous*.⁷⁶ The respondent lawyer in the

70. See *supra* note 63.

71. *Myers*, 663 N.E.2d at 774.

72. *Id.*

73. *Id.* at 774 n.5. The court observed, in pertinent part, "Where there is not an explicit agreement governing contingencies (such as default) arising in relation to structured settlement agreements, other jurisdictions have construed ambiguities in concomitant contingency fee agreement against the attorney." *Id.*

74.

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

IND. R. PROF. COND. 1.5(c).

75. *Myers*, 663 N.E.2d at 774.

76. 667 N.E.2d 394 (Ind. 1995).

case represented a client in a worker's compensation matter. Even though the lawyer made efforts to explain his fee to his client, he failed to set forth the terms of the agreement in writing. Fees in worker's compensation matters are regulated specifically by statute⁷⁷ and are contingent on the outcome of the case. The supreme court held that fee agreements in these matters must be in writing, and, because there was no writing in the instant case, the lawyer violated Rule 1.5(c).⁷⁸ The court explained,

Written contingent fee agreements increase the client's awareness of what the final bill for legal services will be. It has been stated that a client's consent to pay a specified fee can only be considered voluntary where the lawyer has communicated a fair estimate of the likely total fee to the client in advance.⁷⁹

During the survey period, therefore, the court provided important guidance to the bar regarding legal fees and their reasonableness. Lawyers would be well advised to go the extra mile in making sure the client's understanding of the agreement is clear and unequivocal. This is especially true if the fee agreement is contingent or the method by which fees will be calculated may change during the course of the attorney client relationship.

II. RECENT RULE CHANGES FOR THE BAR

Admission and disciplinary matters within the bar have a constantly changing regulatory landscape. As noted earlier, the Indiana Supreme Court's jurisdiction is limited by the state constitution.⁸⁰ Within the court's jurisdictional ambit, however, it has plenary authority to change its rules for admission to, and the operation of, the Indiana bar. During the prior survey period, for example, the court created rules governing the operation and record keeping requirements associated with trust accounts.⁸¹ The follow up to that rule change, along with several other additions and modifications to the operation of the bar, were promulgated through orders of the Indiana Supreme Court issued in late December 1996.

A. Rules Affecting The Disciplinary Process

1. *Trust Accounts*.—Perhaps the most anticipated rules in this area were the procedural rules which would implement the late 1995 creation of rule 23, section 29 of the Indiana Rules for Admission and Discipline of Attorneys. In short, the 1995 amendments require lawyers to keep certain records (specified in the rule)

77. See IND. ADMIN. CODE tit. 631, r. 1-1-24 (1996).

78. *Anonymous*, 667 N.E.2d at 395; see also *supra* note 74.

79. *Anonymous*, 667 N.E.2d at 394 n.3 (citations omitted).

80. See *supra* note 50.

81. See Kevin P. McGoff, *Survey of 1995 Developments in the Law of Professional Responsibility*, 29 IND. L. REV. 1005, 1006-08 (1996) (discussing IND. ADMIS. DISC. R. 23, § 29).

associated with maintaining a trust account.⁸² In addition, the rule mandated that lawyers could only keep trust accounts at financial institutions that are on an “approved” list maintained by the Indiana Supreme Court Disciplinary Commission.⁸³ The primary burden on an “approved” financial institution was a requirement that the institution agree to notify the Disciplinary Commission of all overdrafts on lawyers’ trust accounts.⁸⁴ As a practical matter, these rule changes meant that the commission would have to contact virtually every financial institution in the state in order to afford them an opportunity to become an “approved” institution.

Structurally, the Indiana Supreme Court Disciplinary Commission Rules Governing Attorney Trust Account Overdraft Reporting are divided into six parts: Rule 1—Definitions; Rule 2—Approval of Financial Institutions; Rule 3—Disapproval and Revocation of Approval of Financial Institutions; Rule 4—Duty to Notify Financial Institutions of Trust Accounts; Rule 5—Processing of Overdraft Reports by the Commission; and Rule 6—Miscellaneous Matters.

The definitions sections of Disciplinary Commission Rule 1 are self explanatory and identify the terms “Financial institution,” “Trust account” and “Properly payable.”⁸⁵ Disciplinary Commission Rule 2 describes the approval process for financial institutions. The written agreement between the financial institution and the commission is contained in the rules.⁸⁶ Of particular significance to the practicing bar, the rule requires that a listing of the approved financial institutions be published in *Res Gestae*, the official publication of the Indiana State Bar Association, each year in December.⁸⁷ Otherwise, the names of approved financial institutions will be available through written or telephone inquiries to the commission.⁸⁸

Disciplinary Commission Rule 3 specifies the procedure and causes why a financial institution might be denied approval or why existing approval under the rule might be revoked. In particular, an institution might have its approval

82.

Every attorney shall maintain and preserve for a period of at least five (5) years, after final disposition of the underlying matter, the records of trust accounts, including checkbooks, canceled checks, check stubs, written withdrawal authorizations, vouchers, ledgers, journals, closing statements, accounting or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property held in trust.

IND. ADMIS. DISC. R. 23, § 29(a)(2) .

83. *Id.* § 29(a)(1).

84. *Id.* § 29(b)-(c).

85. IND. SUP. CT. DISCIPLINARY COMM’N R. GOVERNING ATT’Y TRUST ACCT. OVERDRAFT REPORTING 1 [hereinafter DISC. COMM’N R.].

86. DISC. COMM’N R. Exh. A.

87. DISC. COMM’N R. 2C.

88. DISC. COMM’N R. 2C.

revoked "if it engages in a pattern of neglect or acts in bad faith in not complying with its obligations under the written agreement."⁸⁹ The commission's refusal to give approval to an institution who refuses to submit an executed written agreement is not appealable or subject to challenge.⁹⁰ An institution whose approval has been revoked or withheld can, however, submit a petition including a plan for curing the deficiencies which caused the adverse finding in the first instance.⁹¹

Disciplinary Commission Rule 4 requires the lawyer or law firm to explicitly identify for the financial institution which of the firm's accounts is a trust account.⁹² Under the rule, the approved institution obviously has no duty to report to the commission for overdrafts on accounts that have not been identified as trust accounts.⁹³ The rule does, however, impose a duty on every member of a firm to insure that the financial institution has notice of each account that is a firm trust account.⁹⁴

The commission, meanwhile, has a duty to notify the lawyer/account holder whenever it receives notice of a trust account overdraft from a financial institution.⁹⁵ In this notification, the commission must give the lawyer ten business days to explain the overdraft.⁹⁶ As with complaints received by the commission, the request is actually a demand for information. Under the terms of the rule, failure to comply with the commission's request could be viewed as a refusal to cooperate with a disciplinary matter as prohibited by Professional Conduct Rule 8.1(b).⁹⁷ If the circumstances warrant, the Executive Secretary of the Disciplinary Commission can bring the matter to the attention of the full commission to consider whether a grievance should be issued against the attorney/account holder.⁹⁸

89. DISC. COMM'N R. 3B.

90. See DISC. COMM'N R. 3A.

91. See DISC. COMM'N R. 3D.

92. DISC. COMM'N R. 4A.

93. DISC. COMM'N R. 4C.

94. DISC. COMM'N R. 4B.

95. DISC. COMM'N R. 5A.

96. DISC. COMM'N R. 5A.

97.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

....

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

(emphasis added). IND. R. PROF. COND. 8.1.

98. DISC. COMM'N R. 5B.

The upshot is that the creation of these rules mandates uniformity in the way in which Indiana lawyers manage trust accounts. Irrespective of the area in which a lawyer or law firm concentrates its practice, the structure and maintenance of its trust accounts will be very similar to other trust accounts around the state. This uniformity will also aid in the regulation of the bar in that the Disciplinary Commission will be able to discover and react to trust account problems more promptly and with greater consistency of result.

2. *Disbarment.*—Before the end of 1996, the court produced a series of amendments to the relevant provisions of its rules. The changes made it clear that disbarment is, in the court's view, a permanent sanction. Specifically, the court amended rule 23, section 3 of Indiana Rule for Admission and the Discipline of Attorneys to change the language of the rule, which previously provided for "permanent disbarment from the practice of law subject to reinstatement hereafter provided,"⁹⁹ to delete all references to reinstatement.¹⁰⁰ The significance of these amendments provides that disbarment no longer carries with it any reference to reinstatement and, it appears, abrogates reinstatement as an option for disbarred lawyers. In theory, this change makes resignation from the bar a more attractive option for lawyers who have committed the most serious violations rather than gambling on a trial in hopes of a sanction less severe than disbarment.

3. *Public Representation in the Disciplinary Process.*—During the survey period, the structure of the Indiana Supreme Court Disciplinary Commission was altered to increase the number of members from seven to nine. The additional positions on the commission were created expressly for the purpose of adding non-lawyer members. By rule change effective February 1, 1996, the supreme court defined the new composition as follows:

(b) The Disciplinary Commission shall consist of nine (9) members appointed by the Supreme Court of Indiana, seven (7) of whom shall be admitted to the Bar of the Supreme Court and two (2) of whom shall be lay persons. Those who are not members of the Bar must take and subscribe to an oath of office which shall be filed and maintained by the Clerk of the Court. A reasonable effort shall be made to provide geographical representation of the State. The term of each member shall be for five (5) years. Provided, however, upon the effective date of this rule, two (2) members shall be appointed for a term of two (2) years, two (2) members for a term of three (3) years, two (2) members for a term of four (4) years and (1) member for a term of five (5) years. The initial term of the two additional members authorized by the amendment of this subsection effective February 1, 1996, shall be for two (2) and four (4) years, respectively. Thereafter, the terms of each appointee shall be for five (5) years, or in the case of an appointee to fill the vacancy of an unexpired term, until the end of such unexpired term. Any member may be terminated by the Court for a good cause.

99. IND. ADMIS. DISC. R. 23 § 3(a) (1996) (before amendment).

100. IND. ADMIS. DISC. R. 23 § 3(a).

Commission members who are not admitted to the Bar shall not be eligible for appointment as hearing officers under Section 18(b) of this rule.¹⁰¹

This is the first time in Indiana's regulation of the bar that lay representatives have had a voice in the disciplinary process.

B. Rules Changes Affecting Admission to the Bar

In the latest series of rule changes, the Indiana Supreme Court adopted new provisions and expanded several old provisions to clarify the process by which candidates are admitted to both Indiana's bar examination and to the bar itself. Of particular significance, the provisions dealing with the process of determining a candidate's character and fitness have been modified. Furthermore, the Board of Law Examiners now has some specific provisions identifying what specific information in its records are subject to disclosure.

Extensive changes have been made with respect to the "character and fitness" process.¹⁰² Although some of the amendments could fairly be termed as clean up provisions, this rule has been substantially reconstructed to give a more formal process for determining whether an applicant possesses the requisite character to be admitted to the Indiana bar. Some of the more important amendments are described below.

Section 5 permits the State Board of Law Examiners to require an applicant to appear before the full board and to submit additional proof for inquiry into an applicant's character and fitness.¹⁰³ The board's finding regarding the character and fitness of each applicant must be either: (1) eligible for admission to the bar;¹⁰⁴ (2) not eligible for admission, with or without permission to reapply;¹⁰⁵ or (3) due to concerns "based upon evidence of drug, alcohol, psychological or behavioral problems," admission is conditional¹⁰⁶ or withheld for up to two years to show rehabilitation,¹⁰⁷ or that the determination must be extended for up to a year.¹⁰⁸ If the board finds the applicant is not eligible for admission to the bar, the applicant has thirty days to file a written request for a hearing.¹⁰⁹ The board may dispense with the hearing and submit the matter, with their written findings, to the supreme court.¹¹⁰ A hearing of the board is before a panel of three of its

101. *Id.* § 6(b). Section 18(b), referred to in the rule, governs the procedure in license reinstatement matters.

102. IND. ADMIS. DISC. R. 12.

103. *Id.* § 5.

104. *Id.* § 6(a).

105. *Id.* § 6(b).

106. *Id.* § 6(c).

107. *See id.* § 6(d).

108. *See id.* § 6(e).

109. *See id.* § 7.

110. *See id.* § 8.

members.¹¹¹ Further provisions within the rule require specific notice of the hearing to the applicant, a record of proceedings and findings from the panel to the full board to permit it to make a decision.¹¹² One provision even permits the board to hire an outside lawyer to represent the state during the hearing.¹¹³ This new process also permits the board to recommend revocation of admission or conditional admission to the supreme court if the applicant has violated conditions of admission, falsified evidence or not fully disclosed evidence in regards to character and fitness.¹¹⁴

This formalization of the conditional admission process allows the State Board of Law Examiners considerably more flexibility in tailoring admission to fit both the concerns of the board in protecting the public and, at the same time, permitting admission to a broader array of candidates.

Also formalized in this round of rule amendments, the State Board of Law Examiners now has more specific rules regarding information which it can disclose.¹¹⁵ As with prior practice, information available to the general public is primarily limited to the names of applicants who have successfully passed the bar examination and the names of those who have been admitted to the practice of law.¹¹⁶ Other sections permit disclosure of limited information to national entities such as the National Conference of Bar Examiners and the Law School Admission Council Bar Passage Study.¹¹⁷ The disclosure provisions also permit some information to be obtained by the Supreme Court Disciplinary Commission in the course of disciplinary matters, provided that the disclosure is not prohibited by other law.¹¹⁸ The applicant can also obtain copies of materials submitted to the board or by the applicant, and if a hearing was held, the record of the hearing will be made available to the applicant.¹¹⁹

CONCLUSION

The contours of the professional responsibility landscape are changing dramatically for both current members of the bar and for those who hope to be admitted in the future. These changes occur through a variety of mechanisms including the development of case law associated with the Indiana Rules of Professional Conduct and the civil law developed from lawyer malpractice cases. These changes also occur through the creation of new rules and modification of existing rules. The gravamen of this work is to demonstrate that standards expected of the bar are rising in all areas and at all levels of practice.

111. *See id.* § 9(a).

112. *See id.* § 9(b)-(d).

113. *Id.* § 9(e).

114. *See id.* § 10.

115. *Id.* § 19.

116. *Id.* § 3(a)-(b).

117. *Id.* § 3(c)-(e).

118. *Id.* § 3(f).

119. *Id.* § 3(g).

A careful study of materials associated with professional responsibility issues will show the reader that the groundwork is in place for even more changes on the horizon. Future areas of change will probably include the interest on lawyers' trust accounts and a formalized scheme for fostering pro bono practice. This is an important time for the law of lawyering. Attorneys should make a commitment to develop their knowledge of professional responsibility issues on a routine timetable as they would with the substantive areas of law in which they normally practice. Failing to do so could have far reaching, and dire, consequences on the lawyer's continued practice of law.

CAPTIVE GAS AND CONDEMNED TRASH: HIGHS AND LOWS OF INDIANA PROPERTY LAW IN 1996

DANAYA C. WRIGHT*

INTRODUCTION

It is hard to believe that another year has gone by and that you may be a year behind on the current changes in Indiana property law. Property was bought and sold, leased and zoned, and devised and developed in ways that inevitably led to controversies and lawsuits. The Indiana courts were faced with the usual array of landlord/tenant disputes, marital property divisions, and abandoned easements. In many of those cases, the courts reaffirmed well-established property-law principles without burdening the dockets of the appellate courts. What follows is a discussion of a number of cases to offer important refinements, qualifications, and exceptions to traditional property rules.

I. BROKERS

In *Egan v. Burkhardt*,¹ two licensed real estate brokers had entered into an exclusive listing contract with sellers for the sale of real estate. Five months later, brokers found a buyer who would purchase the property under an installment contract from sellers for \$35,000. Three days before closing, the buyers notified brokers that they did not have the down payment and requested a loan from brokers. The brokers loaned the buyers the money, and the closing went through. One and a half years later the buyers defaulted and the sellers then learned of the loan. Sellers repossessed the property and sold it, some months later, for \$20,000. Sellers then sued brokers for breach of fiduciary duty to sellers to notify them of the buyers' potential insolvency. At trial, the court found brokers had breached by not disclosing the loan and awarded damages of nearly \$25,000. The court of appeals affirmed the breach of contractual duty of good faith arising under the agency relationship with sellers, finding in particular that sellers would not have entered into the real estate contract with buyers had sellers known of buyers' weak financial condition.²

The court of appeals also upheld the \$25,000 damage award for loss on resale, real estate taxes until resale, improvements, and attorney fees associated with repossession and relisting the property for resale.³ But what damage was occasioned by the brokers' breach? Assuming that sellers would not have entered into the sales contract with buyers had they known of the buyers' weak financial condition, sellers would have had no sale had brokers not breached. Putting the parties back to their original position (which is where they would be had the

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1. 657 N.E.2d 401 (Ind. Ct. App. 1995)

2. *Id.* at 405.

3. *Id.*

brokers not breached) would put sellers in the same position they were in after they repossessed, with their land back (less the expenses expended in repossession and preparing for resale). How the brokers' breach caused the \$15,000 loss on resale is not entirely clear.

In another instance of overzealous brokerage, a real estate broker was held liable for selling the wrong lot and misrepresenting her authority to sell. In *Tri-Professional Realty v. Hillenburg*,⁴ Betty Jones Wood spied a homemade "For Sale" sign on a subdivision lot in Putnam County, called the number on the sign and convinced the owner to enter into a professional listing agreement with Tri-Professional Realty. She then sold the lot to Hillenburg on a four-year contract, and Hillenburg began to clear the lot for a building site. Much to Hillenburg's dismay, however, the real owners of her lot discovered her "trespass" and informed her that she was improving the wrong lot. As it turned out, she had actually bought a hilly lot at the back of the subdivision, but the owner of the back lot had placed her sign on a lot up near the road, and Wood had never clarified exactly which lot she had authority to sell. The issues for the court were (1) whether Wood had a professional duty to investigate the seller's title; (2) whether she was liable to the buyer even though Indiana law generally holds that agents of the seller have no legal duty to a buyer; and (3) if so, what damages were sustained when she received a lot worth the same amount as the one she thought she was buying.

The trial court ruled in favor of Hillenburg on a charge of negligence,⁵ and the court of appeals affirmed, finding that Tri-Professional Realty did not owe Hillenburg a fiduciary duty as would arise in an agency relationship, but did owe a duty not to misrepresent its authority to sell a piece of property.⁶ Hillenburg received nearly \$5000 damages which represented the cost of the lot plus interest.⁷ However, the award was not offset by the \$1000 trespass judgment obtained by the actual owners of the front lot. In a strong dissent, Judge Baker argued that, under agency law, an agent should not be held liable for acting on misrepresentations of the principal and, therefore, Wood should not be held liable for the seller's misrepresentations regarding the lot.⁸ He also suggested that mutual mistake should have allowed for rescission.⁹

II. DEEDS

In an interesting twist on the standard rule that a "transferor by means of a warranty deed guarantees that the real estate is free from all encumbrances and that

4. 669 N.E.2d 1064 (Ind. Ct. App. 1996), *trans. denied*.

5. *Id.* at 1065.

6. *Id.* at 1067-68. The majority distinguished between a realtor's duty not to misrepresent her authority and sell a lot of duty to insure good title to the lot, both of which might arise under general negligence doctrine and not under agency law.

7. *Id.* at 1070.

8. *Id.* at 1070-71 (Baker, J., dissenting).

9. *Id.*

he will warrant and defend the title to the same against all lawful claims,”¹⁰ the court of appeals distinguished between successful and unsuccessful defenses of title by grantees. In *Rieddle v. Buckner*,¹¹ Judge Baker ruled that grantees who were unsuccessful in their suit to quiet title against an adverse possessor were entitled to reasonable attorney fees and costs in addition to compensatory damages for the value of the land lost from the transferor. But in a quiet title and slander of title case, Judge Baker ruled in *Keilbach v. McCullough*¹² that, because McCullough’s suit to quiet title to a seven-acre plot of land claimed by a gun-toting neighbor under adverse possession was successful, Keilbach had not breached his warranty and was therefore not liable for attorney fees incurred in the quiet title action.¹³ Judge Baker also questioned the trial court’s award of attorney fees in the slander of title action as being contrary to the American rule that parties to litigation should pay their own attorney fees in the absence of a statute or agreement providing otherwise but upheld them anyway.¹⁴ If a grantee cannot get attorney fees from the wrongful adverse possessor or from the grantor when she is successful in defending her title, but can get attorney fees and damages when she is unsuccessful, what incentive does she have to defend her title zealously?

In a convoluted and confusing case about the effect of a warranty deed conveyed after a tax sale, the court of appeals shed little light on the issue. In *Atkins v. Niermeier*,¹⁵ both parties wished to purchase a tract of real estate in Harrison County at a tax sale. Niermeier, however, attended the tax sale and purchased the property subject to the usual tax sale rule giving the owner one year to redeem the property. Five months after the sale to Niermeier, Atkins, a stranger to the property, paid the delinquent taxes and penalties. This caused the county auditor to inform Niermeier that the “owner” had redeemed the property and that he should relinquish his tax sale certificate—which Niermeier promptly did. When Niermeier learned nine months later that Atkins was not the legal owner, he filed a complaint to extend the tax sale date of redemption and requested return of his tax sale certificate. Before the trial on Niermeier’s complaint, Atkins purchased the property from the original owner who conveyed title to the real estate to Atkins by a corporate warranty deed which Atkins duly recorded. At trial, the court ordered a reissuance of Niermeier’s tax sale certificate and declared the warranty deed to Atkins void on the grounds that the grantor did not have the “capacity” to issue a warranty deed because of Niermeier’s tax sale lien. Atkins appealed.¹⁶

The court of appeals agreed that Niermeier’s tax sale certificate created a valid lien on the property and that Niermeier’s surrender of the certificate did not void

10. *Rieddle v. Buckner*, 629 N.E.2d 860 (Ind. Ct. App. 1994) (citing IND. CODE § 32-1-2-12 (1993)).

11. *Id.* at 864.

12. 669 N.E.2d 1052 (Ind. Ct. App. 1996).

13. *Id.* at 1054.

14. *Id.* at 1053 n.2. The awarding of fees was not an issue on appeal.

15. 671 N.E.2d 155 (Ind. Ct. App. 1996).

16. *Id.* at 157.

the tax sale.¹⁷ The court held Atkins' payment of the delinquent taxes did not constitute redemption because Atkins was not the owner and had no interest in the property and Niermeier's surrender of the certificate was in reliance on erroneous information.¹⁸ The court also held that Niermeier's tax sale lien was enforceable against Atkins.¹⁹ However, the court refused to void Atkins' warranty deed even though the grantor could not convey title free of all encumbrances.²⁰ What the original owner granted was the grantor's "right to redemption, which is derivative of the right to ownership."²¹ Atkins' title to the property was held good under the warranty deed but subject to Niermeier's tax sale lien, thus giving Atkins, as the present owner, the superior right to redeem the property. But should a warranty deed that is clearly defective be upheld or effectively converted into a quitclaim deed despite the existence of a lien by a party who was timely in exerting his interests to the property through the regular channels and when both parties were strangers to the property at the time of the tax sale?

For a sign that property law is moving into the twentieth century, consider the case of *Nelson v. Parker*.²² In 1994, Russell Nelson executed a warranty deed which conveyed his real property to his son Daniel subject to a life estate for himself and a cohabitant, Irene Parker. Russell died shortly thereafter and Daniel brought an action to quiet title to the property and to eject Irene. Daniel contended that realty cannot be conveyed to a third party by reservation and that, without words of grant or alienation, Irene could not acquire an interest in the property. In support of his claim, Daniel cited *Ogle v. Barker*,²³ which denied a life estate to a wife under roughly the same facts. The *Ogle* court explained that "[a] reservation, as such, must be to the grantor, or, in case of several grantors, to some or one of them; it cannot be made to a stranger to the deed."²⁴ But fifty years later the traditional rule did not seem quite so apropos. The court found a direct conflict between a formulaic application of the *Ogle* rule and the court's modern goal of construing a deed in a manner consistent with the grantor's intent. Although the language in the deed was as unambiguous as the language in *Ogle*, the *Nelson* court held the grantor's intent superseded the well-established common law rule and Irene could therefore remain in the house.²⁵ But should the primacy of the grantor's intent rule extend so far as to allow, in clear and unambiguous terms, a conveyance that violates a well-established rule?

Deed construction is always tricky and judges often must reconcile conflicting intentions with medieval and sometimes strict property rules. But is it always the case that, as we move down the road toward discretionary principles of equity and

17. *Id.* at 158.

18. *Id.*

19. *Id.*

20. *Id.* at 159.

21. *Id.*

22. 670 N.E.2d 962 (Ind. Ct. App. 1996), *trans. granted*, (Ind. Mar. 27, 1997).

23. 68 N.E.2d 550 (Ind. 1946).

24. *Id.* at 554-55.

25. *Id.*

balancing, we will arrive at the best result? Is Irene Parker any more deserving of her life estate than Ms. McCullough is of attorney fees and costs in her battle against the gun-wielding Mr. Martin?

III. EASEMENTS AND SERVITUDES

In *Contel of Indiana, Inc. v. Coulson*,²⁶ the court held that public use of a road justified a prescriptive easement in the state for the paved roadway, but emergency public and state maintenance crews' use on the shoulder remained merely a license. In *Coulson*, the Indiana Court of Appeals affirmed a partial summary judgment in favor of the Coulsons and concluded that, as a matter of law, the State of Indiana has no right-of-way or easement in State Road 63 except by prescription over the traveled part of the roadway.²⁷ The Coulsons own property along State Road 63 in Sullivan County, the boundary of which extends to the center of the road. No fee or easement for right-of-way was ever conveyed to the county or to the state, but the public has traveled freely on the roadway for many years. Recently, the Indiana Department of Transportation issued a permit to Contel to lay long-distance fiber-optic telephone cables in the State Road 63 right-of-way. Contel dug trenches along the road and laid two and a half miles of cable to the side of the paved roadway. The Coulsons filed a complaint against Contel for trespass seeking compensatory and punitive damages for burying the cable after the Coulsons had advised Contel that they owned the property over which the roadway traveled. Contel moved for partial summary judgment and sought a ruling to determine the width of the State Road 63 right-of-way. The trial court entered judgment for the Coulsons, and the court of appeals affirmed.²⁸

On the right-of-way issue, the court ruled that, absent purchase or condemnation, the state's easement over the Coulsons' property cannot be greater than the use.²⁹ It cited a 1981 case holding that the "width of a road established by use is limited to that portion actually traveled and excludes any berm or shoulder."³⁰ The *Coulson* court determined the right-of-way to be coextensive with the paved roadway.³¹ Hence, Contel's permit to lay cable was restricted to the right-of-way owned by the state and would require, presumably, digging under the paved roadway and within the lanes of travel, not in the shoulder area. Moreover, the court held that the state's authority and responsibility to maintain the roads, to mow and maintain ditches and culverts adjacent to the roadway, was based on an implied license and did not rise to an easement.³²

26. 659 N.E.2d 224 (Ind. Ct. App. 1995), *trans. denied*.

27. *Id.* at 228-229.

28. *Id.* at 226.

29. *Id.* at 227.

30. Board of Comm'rs of Monroe County v. Hatton, 427 N.E.2d 696, 699 (Ind. Ct. App. 1981).

31. *Id.* at 228.

32. *Coulson*, 659 N.E.2d at 228. Query: If a license is revocable, could the Coulsons revoke the State's license to maintain the adjacent property? If not, doesn't losing the right to

Contel then argued that it had acquired an easement by prescription because it had previously laid local phone lines in the property between the roadway and the Coulsons' current fenceline and that, in addition to laying long-distance lines, it was repairing and replacing some pre-existing lines. The court did not rule on this issue, noting that genuine issues of material fact remained for trial—namely whether Contel's prior use met the twenty-year statute of limitations.³³

In further judicial action, the court of appeals ruled that a landowner gave permission to a neighbor to cross his land to access a pier with regard to two lots owned by the neighbor, but not with regard to two other lots, thus precluding a finding of adverse possession with regard to any of the lots.³⁴ In *Fleck v. Hann*, the court of appeals reversed the trial court's finding of a prescriptive easement for the Hanns across land of the Flecks. The Flecks owned lakeside lots on Silver Lake and had given permission to the Ransteads—who owned the neighboring inland lots—to cross an unplatted section of their land to reach the lake. The Ransteads built a pier in 1956 which they used and maintained until the present action. In 1968, they conveyed two of their four lots to the Coles. The Coles then conveyed their lots to the Hanns in 1981. The Ransteads, Coles and Hanns used the pier continuously since 1956, rebuilding it periodically, and allowing renters of theirs to use it as well. In 1992, the Flecks sought an injunction to prohibit the Hanns from using or maintaining the pier. The trial court found that the Hanns had obtained a prescriptive easement by tacking the periods of use from the Ransteads and the Coles to the Hanns' period.³⁵ The court of appeals, however, reversed the trial court on the grounds that the Ransteads' use of the pier was by permission and personal, thus their use could not be tacked.³⁶

An interesting tacking issue arose in this case. The Ransteads initially had purchased two lots. At the time of purchase they negotiated with the Flecks for access to the lake and for permission to use the pier. In 1968 they purchased two additional lots that they rented out, extending to the renters the right to use the pier and boat. The court found that the Ransteads were given explicit permission in 1956 to access the pier over the Fleck's land with regard to their initial two lots and that no further discussions occurred when they purchased the additional two lots. The court then determined that the Ransteads could not use the pier by permission with regard to the first two lots and adversely with regard to the other two lots, even though no permission had been given for access by owners or users of the second two lots.³⁷ Finding some use adverse and some permissive was thought to amount to "a kind of secretive adverse use which would ultimately circumvent the stringent requirements that an adverse user must prove to acquire a prescriptive easement."³⁸ Thus, because the Ransteads possessed only a license

revoke a license convert it into an easement by estoppel?

33. *Id.* at 229.

34. *Fleck v. Hahn*, 658 N.E.2d 125 (Ind. Ct. App. 1995).

35. *Id.* at 127.

36. *Id.* at 128.

37. *Id.*

38. *Id.*

to cross over the Flecks' land, their period of use could not be tacked onto the adverse use of the Coles and the Hanns to meet the twenty-year statute of limitations.

Except to the litigants, *McIntyre v. Baker*³⁹ is a wonderfully complex and delightful case regarding constructive notice of pre-existing conditions, replatting of developments, implied reciprocal negative servitudes, and the character of pre-manufactured homes. In 1937, the plat of Bonnie Ney's Addition was recorded, containing two parallel strips of lots numbering 1-28 in one strip and 29-60 in the other. In 1960, the owners of all but two lots entered into a restrictive covenant prohibiting a landowner from erecting "any temporary structures, trailers, garage houses, basement houses or any other temporary dwelling quarters. All buildings to be of new construction, no buildings to be moved in."⁴⁰ Less than a year later, three of the lots were replatted as Bonnie Ney's Second Addition and all the lots contained the relevant restriction. In 1966 lots 29-60 were replatted as Bonnie Ney's Third Addition, but this third plat did not contain any restrictions or refer to the 1960 covenants. In 1994, Kevin McIntyre purchased lot 18 in the Third Addition and was given a warranty deed that used the standard language and referred to "all easements, restrictions, conditions, and covenants of record affecting either the alienability or the use of the Real Estate."⁴¹ Mr. McIntyre then petitioned the Plan Director for an improvement permit to place a manufactured home, breezeway, and garage on his lot, which was granted. Soon after beginning installation, a kindly neighbor informed him that he was in violation of a restrictive covenant. The case raises the following questions: First, did the restrictive covenants of the original Bonnie Ney's Addition survive the replatting of Bonnie Ney's Third Addition? If so, was Mr. McIntyre on constructive notice of the existence of those restrictions if they were not present in the replatting records? Third, should the doctrine of implied reciprocal negative servitudes be applied to create a servitude if none existed to create uniformity in the subdivision? And fourth, even if he was on notice, did he violate the covenant by installing a manufactured home?

In answer to the first question, the court distinguished between sections of a subdivision that were separately platted as distinct entities, some with and some without restrictions, and those that were replatted over a set of recorded restrictions.⁴² Because there never were restrictions of record in the first case, the fact of inconsistent restrictions could not remove or add restrictions to those that differed. But in the latter case, as occurred here, the lot Mr. McIntyre purchased was originally restricted. When it was replatted, the restrictions were omitted. However, the original restrictions were still present in the record and only the consent of all owners of all restricted lots in the plat could remove the original restrictions. Thus, the court held that the restrictions could not be removed by

39. 660 N.E.2d 348 (Ind. Ct. App. 1996).

40. *Id.* at 350.

41. *Id.*

42. *Id.* at 351.

replatting over the old restrictions.⁴³

The court then determined that Mr. McIntyre was on constructive notice of the restrictions because they were properly recorded within the chain of title of his lot.⁴⁴ Although this is certainly a correct application of the doctrine of constructive notice, one might ask whether it is reasonable to expect a purchaser of a subdivision lot to look beyond the records and restrictions of the relevant plat.⁴⁵

Third, and the court did not directly address this issue, is whether the doctrine of implied reciprocal negative easements should come into play to create uniformity in the subdivision where the records are inconsistent?⁴⁶ McIntyre argued that the original restrictions were invalid because they were placed on Bonnie Ney's Addition after two lots had been sold. However, the rule is that modifications cannot be made after some of the lots have been sold without the approval of all owners.⁴⁷ This rule is to prevent removing restrictions after some lots have been sold, not to prevent adding them. It would be patently unfair if some of the lot owners in a restricted subdivision could remove the restrictions after the sale of some lots; it would not be unfair if some of the owners imposed on themselves additional restrictions that were not agreed to by prior owners. Because the *McIntyre* restrictions fell into this second category, the court held that subsequent restrictions would not be invalidated just because some of the lots had been sold unrestricted.⁴⁸

And finally, the court did not address whether or not Mr. McIntyre's manufactured home violated the restrictions.⁴⁹ On remand, the question for the trial court is whether the manufactured home is a "building to be moved in." Clearly, the intent of the restriction is to prevent temporary structures, house trailers, and pre-fab buildings. However, the phrase "building to be moved in," probably would not apply if Mr. McIntyre purchased the Benjamin Harrison Home and decided to move it onto his lot. Although it would be a "building to be moved

43. *Id.* But if conditions had changed between 1960 and 1994 so that the restrictions no longer made sense, would it be necessary to obtain either the consent of all owners or a declaratory judgment that the restrictions were no longer enforceable in order to remove them? *See El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066 (Del. 1984).

44. *McIntyre*, 660 N.E.2d at 352.

45. *See Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925) (holding that a buyer in a subdivision is on inquiry notice that restrictions may exist simply from looking around the development and noticing the uniformity of the construction and use). *See also* CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 8.28 (2d ed. 1993).

46. Implied reciprocal negative easements doctrine combines the theories of real covenants and equitable restriction doctrine to impose uniformity in subdivisions where inconsistency exists among deeds to similar lots. It is most often used to allow purchasers of the lots to enforce restrictions among themselves when the promises were actually between individual lot owners and the developers. For a full discussion, see CUNNINGHAM ET AL., *supra* note 45, § 8.32.

47. *See McIntyre*, 660 N.E.2d at 352. *See also* *Corner v. Mills*, 650 N.E.2d 712 (Ind. Ct. App. 1995); *Elliot v. Keely*, 98 N.E.2d 374 (Ind. App. 1951).

48. *See McIntyre*, 660 N.E.2d at 352.

49. *Id.* at 353 n.4.

in" it would otherwise more than adequately meet the spirit of the restriction and maintain property values. Also, most manufactured homes arrive in multiple pieces and are attached, permanently, when they are on location. In the strict sense, it would not be a building to be moved in, but a few pieces of a building which happen to be more assembled than the usual assortment of lumber, shingles, and drywall sheets that go into the construction of a new home. Thus, is a home that arrives in four pieces different than a home that arrives in 400 pieces? On the other hand, if the purpose is to prevent temporary structures, manufactured homes would be a more difficult call. This home was to be attached permanently to a cement foundation and would not be removable once installed. In that sense, it is not temporary. But it would most likely not meet the aesthetic and durability requirements of new construction.

IV. EMINENT DOMAIN

There were a number of eminent domain cases this past year that met with rather inglorious fates. In *Lincoln Utilities, Inc. v. Office of Utility Consumer Counselor*,⁵⁰ Lincoln Utilities wished to raise its rates by 19%, but the Indiana Utility Regulatory Commission permitted it to raise its rates by only 3.51%. The utility appealed, charging a regulatory taking through the operation of section 8-1-2-6 of the Indiana Code which provides that only utility property that is actually used and useful for the convenience of the public shall be used to determine fair market value of the utility, which then provides the basis for determining rate changes. The court rejected the Constitutional issue for lack of ripeness.⁵¹ The court cited *Williamson County Regional Planning Commission v. Hamilton Bank*⁵² for the rule that "a claim [of a taking] is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."⁵³ In this case, the utility commission's order was merely an interim increase until the commission had sufficient evidence to determine a fair rate of return.⁵⁴

And in another regulatory taking case, *Gorka v. Sullivan*,⁵⁵ a group of Medicaid recipients, taxi companies and common carriers challenged a mandatory reduction in the rates paid to transportation providers of Medicaid patients by the Indiana Family and Social Services Administration and the Indiana Office of

50. 661 N.E.2d 562 (Ind. Ct. App. 1996), *trans. denied*.

51. *Id.* at 566.

52. 473 U.S. 172 (1985).

53. *Lincoln Utilities*, 661 N.E.2d at 566.

54. Even though it was only an interim order, there might still be a temporary taking. If, upon further evidence, the commission determines that a 19% increase in rates is necessary to guarantee a satisfactory return on investments, then a temporary taking might have occurred during the litigation period when the utility was forced to operate at a loss. Cf. Dennis Long, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185, 1198-99 (1997).

55. 671 N.E.2d 122 (Ind. Ct. App. 1996), *trans. denied*.

Medicaid Policy and Planning. In an attempt to reduce the costs of transporting Medicaid patients to and from medical service providers, the Medicaid agencies reduced the rates it would pay to transportation providers and created incentives for eliminating unnecessary transportation claims. The transportation carriers claimed a regulatory taking because the state Motor Carrier Act sets the standards for a "fair" rate, which is higher than that paid by the Medicaid agencies, thus implying that the Medicaid rates are "unfair." After ruling that the state Motor Carrier Act was not preempted by a federal social security statute⁵⁶ that sets rates for transportation providers,⁵⁷ the court did hold that the providers in this case were exempt from the Motor Carrier Act under the government control exemption.⁵⁸ Thus, once the providers accepted a Medicaid contract, the Medicaid agency met the necessary control and supervision requirement to trigger the governmental control exemption.

The providers also contended that the lower rates violated two clauses of the Indiana Constitution by demanding their services without just compensation and by taking their property. However, the court easily dispensed with these arguments on the grounds that the providers had willingly entered into service contracts and could withdraw at any time if the lower rates were not adequate to their needs.⁵⁹ As regarded the confiscation claim, the court found that because the contract was not a state mandate, the rates were binding only through operation of a voluntary contract and not through state action.⁶⁰

This case raises a couple of troubling questions. First, if the Motor Carrier Act sets rates at a reasonably fair and efficient level, and those rates are higher than the Medicaid rates, then the regular transportation customer is ultimately subsidizing the Medicaid patient and the state will have to artificially raise the regular rates to compensate for the subsidy. This means that the costs of providing transportation to Medicaid recipients is partly paid by the general public through Medicaid reimbursements and partly by those regular customers who pay higher rates for using transportation services. We should ask ourselves which of these two groups is best able to cover the cost of this service to low-income patients: other bus and taxicab users who also tend to be in the lower income levels or the general taxpayer who can afford his or her own car and is not dependent on public transportation? Second, is it reasonable to label "voluntary" the acceptance of public service contracts in a state with a deplorable lack of public transportation that has resulted in a high incidence of private car ownership and thus a low population of "regular" transportation customers to subsidize the Medicaid customers?

One person's junk may be another's treasure, but do city workers who remove

56. 42 U.S.C.A. § 1396a(a)(30)(A) (1994).

57. *Gorka*, 671 N.E.2d at 126.

58. *Id.* at 127. The government control exemption releases transportation carriers from compliance with the Motor Carrier Act when a governmental agency has control over the carrier. See IND. CODE § 8-2.1-22-2.1(a)(3) (Supp. 1996).

59. *Gorka*, 671 N.E.2d at 131.

60. *Id.* at 132.

trash and debris from a homeowner's yard effect a taking of the homeowner's property? In *Starzenski v. City of Elkhart*,⁶¹ the amount of debris that was removed from the property filled eight dump trucks, though the cleanup was still incomplete when the Starzenski's attorney obtained a temporary restraining order to prevent further removal of the debris. In later seeking a preliminary injunction, the Starzenskis claimed that the City had violated their due process rights by entering their property and had taken their possessions without just compensation. The trial court denied their request and the court of appeals affirmed.⁶² Judge Barteau analyzed the Fourth Amendment doctrines prohibiting unreasonable searches and seizures and found that two hearings by the City Building Commissioner and Enforcement Authority, coupled with adequate notice and opportunities to be heard and to appeal to a judicial authority, satisfied the Starzenskis' due process rights with regard to the trespass.⁶³ There was no trespass onto the property until the city workers arrived to remove the debris, which they did pursuant to a properly obtained warrant which the Starzenskis had the opportunity to challenge on appeal. With regard to the takings issue, Judge Barteau cited *City of Minot v. Freeland*⁶⁴ for the well-settled rule that "the government's exercise of its police power to abate a public nuisance hazardous to the public health, safety, or welfare does not entitle the property owner to compensation."⁶⁵ In addition, attempts to enforce building and safety codes do not effect a taking.⁶⁶ The Starzenskis claimed that the city authorities threw out items of economic and sentimental value without giving them an opportunity to save them. The court quickly rejected this argument, as the city had been battling the Starzenskis since 1985, having told them numerous times to remove the trash and debris or the city would do it for them.⁶⁷ There was no question, therefore, that this action was nuisance abatement and not a violation of the Starzenskis' Fourth, Fifth, or Fourteenth Amendment rights.⁶⁸

And in the case of *Reinking v. Metropolitan Board of Zoning Appeals*,⁶⁹ the court of appeals held that a property purchaser, who purchased the property with the knowledge that it was burdened by a zoning ordinance, did not have standing to challenge the constitutionality of the ordinance as a taking.⁷⁰ Subsequent owners may raise constitutional issues that arise during their proprietorship; they

61. 659 N.E.2d 1132 (Ind. Ct. App.), *trans. denied, and cert. denied*, 117 S. Ct. 582 (1996).

62. *Id.* at 1136.

63. *Id.* at 1138-39.

64. 426 N.W.2d 556 (N.D. 1988).

65. *Starzenski*, 659 N.E.2d at 1140.

66. *City of Gary v. Ruberto*, 354 N.E.2d 786 (Ind. App. 1976).

67. *Starzenski*, 659 N.E.2d at 1140. Is it necessary to show some economic value in the property allegedly being taken?

68. This case did provide some pedagogic value, if only in demonstrating the difficulties of elevating a common nuisance action into a Constitutional challenge, as oral arguments were heard at the Valparaiso University School of Law.

69. 671 N.E.2d 137 (Ind. Ct. App. 1996).

70. *Id.* at 141.

simply may not challenge ordinance restrictions enacted prior to their ownership and of which they had full knowledge when they purchased the land in question. Such knowledge, however, was not deemed a bar to a petition for a hardship variance, though the property owners still had the burden of proving an undue hardship.⁷¹

V. PERSONAL PROPERTY

There were a number of interesting personal property cases, besides the usual bitter divorce disputes over sofas and televisions, that occupied the Indiana courts this year. Remember bailments? In *Kottlowski v. Bridgestone/Firestone, Inc.*,⁷² a number of Firestone employees lost their tools in a burglary of their employer's business and subsequently brought suit claiming a bailment existed. The trial court granted summary judgment to Firestone on the grounds that a bailment did not exist because the employer did not have control over the tools.⁷³ The Court of Appeals reversed and remanded, finding that a bailment for mutual benefit had been created.⁷⁴ A bailment requires delivery and acceptance of personal property and the standard of care a bailee owes a bailor is determined by the benefit each receives from the bailment.⁷⁵ What made this case difficult, was the common practice that the employees would lock their tools in their own toolboxes each night, but the toolboxes were inaccessible because they were locked in the garage after working hours. Thus, the employer had no direct access to the property when the employee was absent, but the employee could not get to his tools without obtaining a key to the building from the employer. The question for the court was whether delivery and acceptance had been effected, and these are questions about control over the property. Because neither party had clearly assumed a bailment relationship, Judge Najam looked to the practical reality of the situation and concluded that Firestone's "knowledge" that it was impractical for the employees to take their massive toolboxes home each night made it reasonable to conclude that Firestone "intended" to assume control over the employees' property.⁷⁶ Although we might question the propriety of collapsing knowledge into intent for such purposes, the alternative was worse. The employees otherwise would be forced to keep their 1000 lb. toolboxes in their possession at all times to guarantee their protection. The court noted that where impracticality did not prevent the employees from removing their tools at night, a bailment might not be created.⁷⁷ The court thus remanded for a determination of whether Firestone could prove that it was not negligent under the standard of ordinary care created by a bailment for

71. *Id.* at 142.

72. 670 N.E.2d 78 (Ind. Ct. App. 1996), *trans. denied*.

73. *Id.* at 81.

74. *Id.* at 83.

75. *Id.* at 82.

76. *Id.* at 83.

77. *Id.* at 84 n.2. Thus, the hairstylist would be well-advised to take home each night his scissors, combs, and hair dryers.

mutual benefit.⁷⁸ And in addition to the bailment duties, the court also found that the employee/employer relationship created a common-law duty to exercise ordinary care to protect employees from negligence.⁷⁹

In a strong dissent, Judge Sullivan argued that the court's ruling effectively forces Firestone to make its store absolutely burglar-proof.⁸⁰ He would have found that the intervening criminal acts of third parties, who had to take great and destructive measures to break into the store, established that, as a matter of law, Firestone was not negligent. He questioned the majority holding that it was reasonably foreseeable that a break-in might occur.⁸¹ The intervening criminal act raises a clear fact question about the foreseeability of the harm, and thus the exercise of ordinary care.⁸²

And for personal property held jointly, the Indiana Supreme Court split 3-2 in *Parke State Bank v. Akers*,⁸³ involving certificates of deposit placed in a safe deposit box. The parties were married in 1986; one month later the husband had his wife's name placed on four certificates of deposit as joint tenants with rights of survivorship and also authorized her to gain access to the safe deposit box at the bank. In 1990, the husband was diagnosed with cancer and, in 1991, telephoned the bank's president requesting that his daughter have access to the safe deposit box. The bank acquiesced upon condition that he provide written authorization to enter the box, which he did. Then, pursuant to his instructions, the daughter accessed the box, removed four joint CDs, took them to his hospital room for endorsement, and cashed them out for checks written to herself and her two children. The wife then filed suit against the bank alleging breach of the box rental agreement when it permitted the daughter to gain access without the wife's approval. The court of appeals concluded that because the husband did nothing but retrieve and liquidate the CDs, which he owned, the wife suffered no damages.⁸⁴ The supreme court reversed and held that the wife had control over the CDs and was thus in constructive possession of them, granting her a present possessory interest in the property.⁸⁵ Additionally, the court found that the wife had third-party beneficiary rights in the CDs by virtue of her right of survivorship. The court identified this as a "contingent beneficial interest as a donee-beneficiary."⁸⁶ But because the bank breached its box rental agreement, it destroyed the wife's interest that, given the fact that the husband could not leave

78. *Id.* at 84.

79. *Id.* at 85.

80. *Id.* at 86 (Sullivan, J., dissenting).

81. *Id.*

82. But as with any tort question, we should always ask which party was best able to insure: the employer who had control over the premises and earns a profit from the labor and use of the employee's property, or the employees who have knowledge of the true value of the property and who effectively receive rent on the produce of that property?

83. 659 N.E.2d 1031 (Ind. 1995).

84. *Id.* at 1033.

85. *Id.* at 1034.

86. *Id.*

the hospital, made it pretty likely that her contingent beneficial interest would ripen into ownership. Justice Selby noted that because the husband was too ill to ever return to the bank, the wife's contingent beneficial interest somehow became less contingent so that she suffered a more concrete harm by the bank's breach of contract than if the husband had been able to walk to the bank and cash out the CDs.⁸⁷

This decision poses an interesting dilemma. The husband was fully entitled to remove the CDs at any time and cash them in, thus changing his mind about who he believed should be the beneficiary. Had he done so before he went into the hospital, the wife would have had no cause of action. But because he waited until he was physically incapable of gaining access to the box himself, the wife's interest suddenly ripened into a kind of "soon-to-be-vested" ownership that now precluded his changing his mind about his beneficiaries. Under this reasoning, anyone physically prevented from personally carrying out the actions corresponding to a changed mind would be unable to appoint a surrogate or execute a power of attorney to carry out his wishes because the beneficiary's interests had somehow become riper upon the donor's physical incapacity. It is as though the circling of the vultures triggered the change in property rights, not actual death, as the survivorship right implies.⁸⁸

In a difficult case on fixtures and will interpretation, the court declined the opportunity to engage in a detailed analysis of how much weight should be given to factors tending to show the intent of the testator. In *Estate of Meyer v. Meyer*,⁸⁹ the decedent had left a will devising "the entire farm, including Land, Buildings and Equipment" to his nephew, who he also appointed executor. The nephew claimed that he was entitled to thirty-seven head of cattle and the crops as incident to "the entire farm." The court held that the crops were fixtures attached to the land and were therefore included in the term "the land."⁹⁰ As regards the cattle, Judge Darden explained that the term "including" must have been meant as a limitation and not as an enlargement because otherwise the testator would have modified the term with the legal phrase: "but not in limitation of the foregoing."⁹¹ Thus, because the ordinary use of the term is as a limitation, and it was possible to invoke the alternative meaning by elaborating on the term, the "entire farm" was construed to mean only the "land, buildings, and equipment." This meant the cows were not intended to be part of the "entire farm." If so they too would have been listed with the land, buildings, and equipment.

Query: Would the result have been any different if Mr. Post had raised the fox

87. *Id.* at 1034-35.

88. Of course, had the wife suddenly been hit by a bus prior to her husband's succumbing to the cancer, he would be able to send a surrogate to carry out his changed wishes regarding the beneficiaries of his property. Thus, his power to control the property would be restored, despite no change in his physical or mental condition.

89. 668 N.E.2d 263 (Ind. Ct. App. 1996), *trans. denied*.

90. *Id.* at 266.

91. *Id.* at 265. The court explicitly declined to consider the fact that the will was drafted by a layperson who might not have understood the two meanings of "including."

before releasing it for the chase where it was unceremoniously swiped out from under his nose by the ungentlemanly Mr. Pierson?⁹² That was the issue in *Indiana Farm Gas Products Co. v. Southern Indiana Gas & Electric Co.*⁹³ In that case SIGECO purchased natural gas and pumped it into an underground storage field for later distribution to customers in southwest Indiana. Subsequently, IFG leased the tract of land adjacent to SIGECO's field and began drilling for natural gas. Amazingly, it struck gas and hence began negotiations to sell to customers. IFG then filed a petition with the Indiana Utility Regulatory Commission for an order requiring SIGECO to transport the gas from IFG's well through SIGECO's pipeline. The commission initially determined that the IFG gas was produced in Indiana and was "owned" by IFG under the rule of capture.⁹⁴ On a petition for reconsideration the commission determined that SIGECO would only have to transport IFG's gas in its pipeline if it was "native gas" and not "storage gas."⁹⁵ On appeal, the court of appeals held that the commission did not have jurisdiction to determine the property issue of whether the gas was SIGECO's personal property or was gas subject to capture by IFG.⁹⁶ On remand, the commission dismissed IFG's petition.⁹⁷ On appeal the second time, the court did not address whether or not IFG had captured the gas or whether it was SIGECO's property all along; instead, it addressed the "law of the case" issue raised by its earlier determination that the commission did not have the jurisdiction to decide the property law issue. The court affirmed the dismissal of IFG's petition while noting that "ownership is still in dispute."⁹⁸ As a result, we are left dangling as to whether Mr. Post could have owned the fox, then released it to the wild in such a manner as would allow him to recapture it at will, and yet been able to prevent Mr. Pierson from snatching it out from under his nose.⁹⁹

VI. REAL ESTATE CONTRACTS

I always suspected that having a law degree gave rise to a per se charge of unclean hands. The Indiana Supreme Court decided a relatively straightforward case regarding a claim for specific performance of a real estate option agreement but with an interesting twist.¹⁰⁰ In *Wolvos v. Meyer*, Gloria Wolvos entered into an exclusive option to sell a lot in South Bend to Steven Meyer. The option was

92. *Pierson v. Post*, 2 Am. Dec. 264 (N.Y. 1805).

93. 662 N.E.2d 977 (Ind. Ct. App. 1996), *trans. denied*.

94. *Id.* at 979.

95. *Id.*

96. *Id.* at 980.

97. *Id.*

98. *Id.* at 982.

99. This raises two sets of questions: 1) whether the gas, like the fox, could be domesticated, in which case ownership continues regardless of whether the property walked off or was misplaced, and 2) if the property was not domesticated, could one retain a pre-existing property right in the object upon its return to the wild?

100. *Wolvos v. Meyer*, 668 N.E.2d 671 (Ind. 1996).

to remain in effect for 120 days. For some reason, Wolvos did not disclose to Meyer that she had a real estate license and Meyer did not disclose to Wolvos that he was a law school graduate, though he was not licensed to practice in any state. The option agreement provided that Wolvos would undertake an environmental study of the real estate, remedy any violations found thereon, and provide a statement from EPA confirming that the lot was within EPA-accepted levels of all contaminants. Within the 120 days, Meyer notified Wolvos that he wanted to exercise his option to purchase; Wolvos then obtained an environmental analysis and learned that clean-up would cost \$19,000. Wolvos' attorney wrote to Meyer claiming that the option agreement was an unenforceable agreement to agree, and extended to him a different offer of sale in which Wolvos would agree to pay only \$10,000 of the environmental remediation and would not be obligated to provide a statement from EPA confirming any aspect of the environmental condition of the real estate. Meyer rejected the new agreement and brought action for specific performance, which was ordered by the trial court in summary judgment proceedings.¹⁰¹ Wolvos appealed the ruling asserting that Meyer acted with unclean hands, that had she known of his legal training she would not have agreed to forego legal counsel in drafting the original agreement. The court of appeals reversed the grant of summary judgment for Meyer and remanded with instructions to enter summary judgment for Wolvos.¹⁰² Meyer petitioned the Indiana Supreme Court, which reversed the court of appeals and reinstated the trial court's ruling for Meyer.¹⁰³

The Indiana Supreme Court did not hesitate to find that the option agreement was unambiguous and binding, that enough essential terms were present to render it enforceable and that it was not an agreement to agree but an agreement to enter into a standard purchase agreement.¹⁰⁴ The interesting twist comes in considering whether fraud or misrepresentation was present in Meyer's failure to disclose his law degree. Wolvos claimed that she would have sought legal counsel had she known that Meyer had legal training, and additionally that he had a responsibility under the ethical rules¹⁰⁵ to advise Wolvos to seek legal counsel. The court held that because Meyer was not a practicing attorney, he was not subject to the Professional Conduct Rule.¹⁰⁶ It also ruled that because Wolvos discovered "Meyer's legal education only after executing the option contract, she did not rely

101. *Id.* at 674.

102. *See id.*

103. *Id.*

104. *Id.* at 678.

105.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

IND. R. PROF. COND. 4.3.

106. *Id.* at 679.

upon his statements based upon his status as a lawyer.”¹⁰⁷ But isn’t that her point? Because she didn’t know he was a lawyer she was under a false impression that she didn’t need legal advice to review the contract.

*Strodtman v. Integrity Builders*¹⁰⁸ highlights the limitations of both legal and equitable remedies. In 1993, the Strodtmans filed a petition questioning the zoning of a subdivision that Integrity planned to develop adjacent to the Strodtmans’ real estate. Shortly thereafter, the Strodtmans and Integrity entered into an agreement in which the Strodtmans agreed not to oppose the development if Integrity made some changes to its development plan and would provide landscaping on the property adjacent to the Strodtmans’ property.¹⁰⁹ The petition was dismissed with prejudice but Integrity did not provide the landscaping. In 1994, Integrity conveyed the real estate to another developer, but Jeffrey Turner, Integrity’s president, assured the Strodtmans that the landscaping would be done. In September, 1994, the Strodtmans brought suit seeking specific performance against Turner and Integrity. Turner and Integrity filed a motion for summary judgment which was granted by the trial court on the grounds that neither Turner nor Integrity owned the real estate when the Strodtmans filed their complaint.¹¹⁰ On appeal, the court gave the Strodtmans some relief when it found that Integrity had breached the contract as a matter of law by putting itself in a position where it would be unable to perform the contract.¹¹¹ However, the court denied the Strodtmans’ petition for specific performance because Integrity no longer controlled the contract’s subject matter.¹¹²

VII. RULE AGAINST PERPETUITIES

In *Buck v. Banks*,¹¹³ the court of appeals held steady to the traditional Rule Against Perpetuities. The case arose out of a 1958 contract by the Bucks to purchase a parcel of land from Lillian Allen which included a right of first refusal to purchase an additional lot should Allen decide to sell the property. Also, the contract contained a clause making the contract’s provisions binding on each

107. *Id.*

108. 668 N.E.2d 279 (Ind. Ct. App. 1996), *trans. denied*. See also *Alexander v. Dowell*, 669 N.E.2d 436 (Ind. Ct. App. 1996) (Another instance of sales interfering in the court’s ability to order specific performance for breach of a contract concerning real estate.).

109. At trial, the Strodtmans contended that Integrity failed to provide specified landscaping, did not provide a finished site status consistent with the plat, relocated the drainage easement for lot 48, did not provide the earth berm along lots 34 and 35, and built a fifteen-foot hill.

110. *Strodtman*, 668 N.E.2d at 281.

111. *Id.* at 282.

112. *Id.* at 283. In real estate contracts in which each parcel of land is considered per se unique, should a party be permitted to sell when he has a continuing obligation to perform specific things on the land? Should a sale under such circumstances render the seller liable for punitive damages if the sale was conducted to avoid specific performance? Should a covenant that is necessary for permission to develop land be considered appurtenant or personal?

113. 668 N.E.2d 1259 (Ind. Ct. App. 1996).

party's heirs, executors, administrators, and assigns. In 1964, the Bucks made the final payment on the original lot, thus fully performing the contract. In 1993, Mrs. Allen decided to sell the second lot to the Banks who entered into a purchase agreement with her. Before closing, she died, and her estate proceeded with the negotiations. At this time, the Bucks learned of the impending sale and brought suit for specific performance of the option contract. Allen's estate countered that the right of first refusal violated the Rule against Perpetuities, thus voiding the provision in its creation. The trial court ruled for the estate.¹¹⁴

The court found that the clause did not invoke the Uniform Statutory Rule Against Perpetuities,¹¹⁵ which specifically does not apply to nonvested property interests arising out of a nondonative transfer.¹¹⁶ It was, however, subject to the common law Rule Against Perpetuities, codified in 1945,¹¹⁷ which restates the traditional language of lives in being plus twenty-one years. The Bucks argued that the provision purportedly extending the contract to all heirs, executors, and assigns did not apply to the refusal right and thus vested within a life in being. The court rejected this argument finding instead that the phrase "all of the covenants and agreements" included the right of first refusal and was obligatory upon the heirs and assigns.¹¹⁸ Thus, it violated the Rule Against Perpetuities. It clearly was the intent of the parties that the Bucks would have a right of first refusal that would be binding on heirs and assigns; it was unfortunate that the person who drafted the contract did not recognize the Rule Against Perpetuities trap that would undermine the parties' intentions.

The Bucks also asked for reformation pursuant to section 32-1-4.5-1(b) of the Indiana Code to bring it within the Rule. The court denied reformation because, as stated previously, the Uniform Statutory Rule Against Perpetuities was inapplicable to this property interest and there was nothing left to reform because the contract had been fully performed.¹¹⁹ The court was unwilling to explore the intent of the parties as to whether the preemptive right was intended to survive fulfillment and merger of the contract of the first lot.¹²⁰ Nor would the court address reformation doctrine under Indiana's common law "wait and see" rule,¹²¹ which, presumably, would have allowed the interest because it had in fact vested within the perpetuities period.

VIII. TENANCY BY THE ENTIRETY

There were scores of dissolution cases this past year, and hence scores of property settlements. But there were a couple that raised particularly tough issues

114. *Id.* at 1260.

115. IND. CODE §§ 32-1-4.5-1 to -6 (1993).

116. *Buck*, 668 N.E.2d at 1261.

117. IND. CODE §§ 32-1-4-1 to -6 (1993).

118. *Buck*, 668 N.E.2d at 1261.

119. *Id.* at 1261.

120. *Id.* at 1262.

121. *Id.* at 1261 n.1; IND. CODE § 32-1-4.5-3 (1993).

about property held as tenants by the entirety.¹²² In *Mid-West Federal Savings Bank v. Kerlin*,¹²³ the Kerlins obtained a judgment of over \$168,000 against Joe Holland and his company in 1992. At the time of judgment, Joe and his wife owned real property, which was mortgaged, as tenants by the entirety. In 1993, they fell behind in their mortgage payments. In December 1993, the Hollands filed a petition for dissolution of marriage, and in March 1994 the mortgage company began foreclosure proceedings. The mortgage company did not name the Kerlins in the foreclosure action. The dissolution was granted in April 1994 with a property settlement agreement that provided Joe would be the sole owner of the real property, thus making it available for satisfaction of the Kerlins' judgment. Shortly after the dissolution, the property was foreclosed on and sold at a sheriff's sale without notice or reference to the Kerlins and their judgment. The question for the court was whether the duly recorded judgment lien against Joe Holland was a first and prior lien not to be extinguished by the Decree of Foreclosure because the Kerlins were not proper parties to the mortgage foreclosure suit and ought not be bound by the judgment or whether the doctrine of *lis pendens* extinguished their claim. At the time the foreclosure action was filed, the property was held in tenancy by the entirety and was not available for satisfaction of the judgment. Only after the property settlement was finalized was the judgment lien perfected. The court held that the date of filing was the only relevant date for determining who the proper parties were, not the date of foreclosure.¹²⁴ Although the Kerlins' judgment was not a perfected lien until the April dissolution, the court held that the Kerlins were bound by the judgment of foreclosure, which occurred some months after their lien ripened.¹²⁵

The court also agreed that because the Kerlins' judgment did not attach until after the foreclosure suit was filed, it was extinguished by the foreclosure sale under the doctrine of *lis pendens*. The court held that the commencement of the foreclosure action provided constructive notice to pendent lite claimants, i.e. claimants who acquired an interest after commencement of the first suit (the foreclosure action).¹²⁶ This may seem a little tough to swallow for the Kerlins who would have needed direct knowledge that the mortgage company had foreclosed after they had recorded their judgment lien and that the parties had obtained a dissolution of marriage in order to keep their interest alive. But the decision is made somewhat more palatable, perhaps, by the fact that the Kerlins' judgment was subordinate to the original mortgage.¹²⁷

122. See *Diss v. Agri-Business Int'l, Inc.*, 670 N.E.2d 97 (Ind. Ct. App. 1996) (Income from rental property held in tenancy by the entirety was held not-exempt from judgment creditors of one spouse in fraudulent conveyancing action.).

123. 672 N.E.2d 82 (Ind. Ct. App. 1996), *trans. denied*.

124. *Id.* at 86.

125. *Id.*

126. *Id.* at 87.

127. What if a later creditor had beaten them to the courthouse the day after the dissolution decree made Joe Holland's property available for satisfaction of the judgments and interposed itself between Kerlin's judgment and the property?

IX. ZONING

And as usual, there were a number of zoning cases that were appealed this year. One important case, *Hendricks County Board of Zoning Appeals v. Barlow*,¹²⁸ addressed the issue of whether local zoning ordinances were preempted by state and federal laws governing the licensing and regulation of raising exotic animals. In that case the Barlows had obtained all necessary state and federal licenses and permits to enable them to raise various lions, tigers, monkeys, bears, and African hedgehogs. But the Hendricks County Planning and Building Department issued a citation for violation of a zoning ordinance that dictates that land shall not be used for any purpose other than that which is permitted and specified in the district in which the land is located. The Barlow's property was zoned suburban residential. After appealing the citation to the Hendricks County BZA, which was upheld, the Barlows applied for a variance, which was denied. The Barlows then appealed the denial, and the trial court ruled that the zoning ordinance was preempted by the state and federal acts regulating exotic animals.¹²⁹ On appeal, the trial court was reversed on the grounds that the state and federal permit regulations covered substantially different aspects of exotic animal raising than the zoning ordinance and therefore did not preempt the latter.¹³⁰ In particular, the state and federal acts govern transportation, purchase, sale, housing, care, and handling of animals to insure humane treatment of the animals consistent with protecting the health and safety of the community.¹³¹ Preemption occurs only when the superior law attempts a pervasive regulation of the activity or where there is a conflict between the superior and the local law such that compliance with both is impossible.¹³² In this case, the zoning restriction did not pose a conflict with the state and federal licensing schemes and the court held that neither the federal nor the state acts constituted pervasive regulation of the activity.¹³³ In fact, with regard to the state laws, the court implied that where a statute is merely a licensing act, it does not show a clear intent to pervasively regulate the field of activity and local regulation is allowed.

In another zoning case, *Howell v. Indiana-American Water Co.*,¹³⁴ the court of appeals determined that local zoning regulations did not apply to the location of an elevated water storage tank, despite the fact that the water company requested a variance to construct its tank in an area zoned for agricultural use. When the BZA denied its request for a variance, Indiana-American sought declaratory injunctive relief asserting that it was not subject to local zoning regulations. Local landowners claimed that Indiana-American had voluntarily

128. 656 N.E.2d 481 (Ind. Ct. App. 1995).

129. *Id.* at 483.

130. *Id.* at 485.

131. *Id.* at 484.

132. *Id.* (citing *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992)).

133. *Id.* at 485.

134. 668 N.E.2d 1272 (Ind. Ct. App. 1996), *trans. denied*.

submitted itself to the local zoning board and could not now disclaim its authority. The Indiana Supreme Court has held that public utility facilities are not subject to local zoning ordinances on the grounds that they serve a wider public interest than the local zoning boards.¹³⁵ In *Graham Farms, Inc. v. Indianapolis Power & Light Co.*, the court held:

The 1947 statute [authorizing local zoning ordinances] does not specifically provide, and it cannot be assumed that the legislature would authorize, a municipality or a county to regulate a public utility when the utility is serving the larger interest in the general public. The utility is regulated by the Public Service Commission, and local regulation is inimical to that larger interest.¹³⁶

The court thus held that local zoning ordinances are preempted by public utility regulations which grant to the commission “the power . . . to enforce the provisions of this act, as well as all other laws, relating to utilities.”¹³⁷ Hence, when zoning ordinances impose additional burdens on individuals engaged in activities like raising exotic animals, they are not preempted by state and federal regulations, but when they interfere with necessary public services they will be preempted in the name of serving the greater public interest.

135. *Graham Farms, Inc. v. Indianapolis Power & Light Co.*, 233 N.E.2d 656 (Ind. 1968).

136. *Id.* at 666.

137. *Darlage v. Eastern Batholomew Water Corp.*, 379 N.E.2d 1018, 1020 (Ind. App. 1978).

1996 DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

Both the 109th Indiana General Assembly and the Indiana Tax Court contributed to the 1996 changes and clarifications to all of the major, and to many of the minor, Indiana tax laws. This Article highlights some of the more interesting 1996 developments. The following abbreviations are frequently used in this Article: Indiana Department of State Revenue (IDSR) and Indiana State Board of Tax Commissioners (ISBTC).

I. GENERAL ASSEMBLY LEGISLATION

There were hundreds of 1996 legislative changes that impacted Indiana taxation, many of which had a direct effect on both broad segments of Indiana residents as well as narrow segments of Indiana residents. Many of the changes were attempts to fine-tune existing laws, but significant policy changes surfaced in four major areas: income tax, property tax, probate, and other relevant laws.

The general assembly passed four bills into law which have an impact on Indiana income taxation. The first of these establishes the medical savings account contribution deduction for employers.¹ A provision of this law provides that an employer may assist in paying the deductible amount on an account the employer purchases to establish a medical savings account if the employer did not previously assist in paying for its employees' medical expenses.² This law also reconciles conflicts between previously enacted statutes.

Second, the general assembly enacted legislation that affects local Indiana income taxation. A provision of this law, effective March 15, 1996, allows Ripley County to appeal to the ISBTC to adjust its maximum General Fund property tax levy in 1996 to restore an amount equal to the amount that the levy was reduced in 1995 due to the creation of a child services fund.³ Another provision of this law allows a county to reduce the required six-month balance of that county's adjusted gross income tax special account to a three-month balance.⁴ Finally, this law

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1. IND. CODE § 6-8-11-10(c) (Supp. 1996) (retroactive to January 1, 1996).

2. *Id.* § 6-8-11-10(b).

3. Act of Mar. 15, 1996, No. 58, § 2, 1996 Ind. Acts at 1535-36. (This provision, retroactive to January 1, 1996, will expire January 1, 1998 and is not codified.)

4. IND. CODE § 6-3.5-1.1-9.5(a) (Supp. 1996).

contains a provision which provides a formula for allocating the distribution among civil taxing units.⁵

Third, the general assembly enacted legislation that affects the state income tax liabilities members of a partnership, limited liability company, limited liability partnership, and shareholders of a Subchapter S corporation by allowing an enterprise zone investment credit or an historic rehabilitation credit against state tax liability to pass through⁶ to the members of a partnership, limited liability company, limited liability partnership, or shareholders of a Subchapter S corporation, for qualified investments or expenditures in Vigo County.⁷

Fourth, the general assembly addressed a number of issues affecting Indiana income taxation in general. The law now provides that a person is a retail merchant making a retail transaction when the person furnishes or sells an intrastate telecommunication service and receives gross retail income from billings or statements rendered to customers.⁸ Other provisions of this law provide that: the research expense tax credit expires December 31, 1999;⁹ the Commission on State Tax and Financing Policy shall, during the interim after the 1996 session of the general assembly, review issues relating to enterprise zones;¹⁰ an enterprise zone business be required to assist the zone urban enterprise association;¹¹ the municipal legislative body shall determine the amount of assistance a zone business must provide to an urban enterprise association;¹² the municipal legislative body may disqualify a zone business if it does not assist the urban enterprise;¹³ the summary of tax credits form be required to be submitted to the state enterprise zone board by a zone business to also be submitted to the local zone urban enterprise association;¹⁴ disclosure of the report is a Class A misdemeanor;¹⁵ and, proceeds received by a commuter transportation district from the sale of equipment in a sale and leaseback transaction may be invested in or used to purchase a guaranteed investment contract with an insurance company whose long term indebtedness is rated in one of the two highest categories by at least two national rating services.¹⁶ This law also includes a provision that

5. *Id.* § 6-3.5-1-1-9.5(e).

6. *Id.* § 6-3.1-10-6.5 (retroactive to January 1, 1995).

7. *Id.* § 6-3.1-10-4 (enterprise zone); *id.* § 6-3.1-16-7.5 (historic property).

8. *Id.* § 6-2.5-4-6(b) (effective March 21, 1996).

9. *Id.* § 6-3.1-4-6 (effective July 1, 1996). This provision would have expired December 31, 1996. The law was also amended to allow limited liability partnerships to take advantage of the credit. *See id.* § 6-3.1-4-1.

10. Act of Mar. 21, 1996, No. 8, § 12, 1996 Ind. Acts 923, 936-37. (This section is uncodified.)

11. IND. CODE § 4-4-6.1-2(b) (effective January 1, 1996).

12. *Id.*

13. *Id.*

14. *Id.* § 4-4-6.1-2.5(a).

15. *Id.* § 4-4-6.1-2.5(b).

16. *Id.* § 8-5-15-3(d) (effective March 21, 1996).

increases the floor for filing quarterly estimated tax returns from \$100 to \$400.¹⁷ Another provision included in this law allows an employer of a domestic service employee to withhold income tax and unemployment insurance contributions in the same manner as allowed under the Internal Revenue Code.¹⁸ Finally, this law contains a provision which allows the industrial recovery credit to be assigned to a lessee of the site owner.¹⁹

In the area of property taxation, the general assembly enacted twelve bills into law. The first of these extends the interstate exemption from property tax for packaged inventory destined for an out-of-state buyer to include books or other printed materials stored at an in-state commercial printer's facility.²⁰

Second, the general assembly approved measures which affect solid waste district property tax levy and revenue. A solid waste management district must now receive approval of a proposed property tax levy and use of the property tax revenue from a majority of the county fiscal bodies in the district if the levy increases by at least five percent over the previous year's levy.²¹

Third, the general assembly established various rules that affect county welfare financing. This law provides that the requirement that a civil taxing unit obtain the permission of the ISBTC before incurring certain forms of debt does not apply to debt that will be repaid through property taxes collected for financing county welfare.²² Another provision of this law provides that the county fiscal body, rather than the Local Government Tax Control Board, is the proper authority to determine whether to increase the maximum County Family and Children property tax levy.²³ This law also contains a provision that will allow Floyd County to transfer up to \$500,000 from the County Welfare Fund to the County Family and Children Fund.²⁴ Finally, this law requires the State Budget Agency to carry out a study of county welfare services and related services before December 1, 1996.²⁵

Fourth, the general assembly changed and added to existing legislation which affects school finance. A provision of this law provides for changes from \$6.90 in calendar year 1996, to the sum of the 1995 adjusted general fund tax rate plus twenty-five cents, the general fund ad valorem adjusted property tax rate ceiling for on-chart school corporations.²⁶ Another provision of this law changes the basic school tuition formula provisions that reduce the guaranteed minimum amount of state support for a school corporation with a declining student population in two

17. *Id.* § 6-3-4-4.1(c) (effective January 1, 1997).

18. *Id.* § 6-3-4-8(j), (k) (retroactive to January 1, 1996).

19. *Id.* § 6-3.1-11-16(c) (effective March 21, 1996).

20. *Id.* § 6-1.1-10-29, -29.5(d) (retroactive to January 1, 1996).

21. *Id.* § 13-21-3-16.

22. *Id.* § 6-1.1-18.5-9.7 (effective March 21, 1996).

23. *Id.* § 6-1.1-18.6-3 (effective July 1, 1996).

24. *Id.* § 12-19-3-2.1 (effective March 21, 1996).

25. Act of Mar. 21, 1996, No. 52, § 5, 1996 Ind. Acts 1482, 1484-88. (This section is effective March 21, 1996 and is uncodified.)

26. IND. CODE § 6-1.1-19-1.5(b)(A)(ii) (Supp. 1996) (effective March 21, 1996).

successive years.²⁷ This law also contains a provision that further provides for a second variable equalization grant to certain school corporations.²⁸ In another provision, this law increases the 1996 tuition support calendar year cap from \$2,457,400,000 to \$2,467,000,000.²⁹ Further, another provision included in this law allows certain school corporations to make a one-time transfer of money from the capital projects fund to the general fund for remedial summer and special school functions.³⁰ Finally, this law allows an appropriation for teachers' social security distribution to be used also for retirement distributions under the school formula and applies the same distribution principles to educational cooperative distributions.³¹

Fifth, the general assembly enacted legislation that affects remonstrance procedures and school transportation expenditures. First, this law allows a school corporation to appeal to the ISBTC to increase the maximum levy for the school corporation's Transportation Fund (Operating Costs Account) due to the closure of a school building within the school corporation that results in a significant increase in the distances that students must be transported to attend another school building.³² This law also changes the remonstrance process applicable to the issuance by political subdivisions of bonds, leases, and other evidences of indebtedness for projects that cost more than \$2,000,000 to: exempt a political subdivision from certain other procedures when the political subdivision has complied with the remonstrance procedure; specify that the county auditor has fifteen business days to review a petition requesting a remonstrance or containing signatures supporting or opposing a project; specify that petitions and remonstrances must be verified within the time specified for filing the petitions and remonstrances; and, require county auditors to distribute the number of petition and remonstrance forms requested by an owner of real property within the political subdivision.³³ This law also contains a provision that allows a school corporation to pay from the school bus replacement account the capital portion of the school corporation's expenses under an agreement to provide contracted transportation services.³⁴ This law includes a provision that allows a school corporation to appeal to the ISBTC for a one-time adjustment to the maximum allowable property tax levy for a school transportation fund, to treat cash reserves used to fund transportation expenses in 1995 as part of the base on which the 1996 property tax levy is computed.³⁵ A related provision of this law requires that

27. *Id.* § 21-3-1.7-6.5(b) (STEP 8) (retroactive to January 1, 1996).

28. *Id.* (STEP 9).

29. *Id.* § 21-3-1.7-9(b)(2).

30. Act of Mar. 21, 1996, No. 30, § 6(b), 1996 Ind. Acts 1207, 1220. (This provision is effective March 21, 1996 and is uncodified.)

31. *Id.* § 8, 1996 Ind. Acts at 1243. (This provision is retroactive to July 1, 1995 and is uncodified.)

32. IND. CODE § 6-1.1-19-5.4(a)(5) (Supp. 1996) (retroactive to January 1, 1996).

33. *Id.* §§ 6-1.1-20-3.1, -3.2 (effective March 21, 1996).

34. *Id.* § 21-2-11.5-2(e) (retroactive to January 1, 1996).

35. Act of Mar. 21, 1996, No. 53, § 11, 1996 Ind. Acts 1488, 1504-05 (expires January 1,

revenues collected by the school corporation as a result of such an appeal, to be expended only as appropriated in a budget or supplemental budget.³⁶ Finally, a provision of this law requires an adjustment in the assessed valuation used to compute state school transportation distributions to neutralize the effect of a general reassessment.³⁷

Sixth, the general assembly modified existing legislation to include changes as well as enhancements that affect property tax deductions and property tax exemptions. A provision of this law increases the income (adjusted gross income) and assessed valuation limitations applicable to the property tax deductions for the elderly, the blind and disabled, and World War I veterans.³⁸ Another provision of this law allows a taxpayer to claim a 1992 interstate commerce exemption for property tax on inventory under certain circumstances.³⁹

Seventh, the general assembly established a procedure for claiming a property tax exemption for a chassis used to fill an order from an out-of-state dealer.⁴⁰

Eighth, the general assembly adjusted various aspects of property tax revenue and collection procedures. A provision of this law allows the county treasurer to treat property taxes "paid" with a dishonored check or other financial instrument as delinquent unpaid taxes.⁴¹ Another provision of this law requires that collection fees charged by a private entity collecting delinquent property taxes for a county treasurer be reasonable.⁴² This law also added four more reasons for setting aside a judgment against a delinquent personal property taxpayer.⁴³ Another provision of this law changes the amount and interest rates payable to redeem property sold at a tax sale from 10% to 12%.⁴⁴ In another provision, this law changes from monthly to quarterly the schedule under which a county treasurer remits gross income taxes collected when real property is transferred.⁴⁵ This law changes the information that a county treasurer stamps on a deed or other instrument of conveyance to provide proof of the payment of gross income tax and changes from monthly to quarterly the schedule under which a county treasurer remits gross income taxes collected when real property is transferred.⁴⁶ Another provision requires the sheriff to apply the proceeds of a sheriff's sale to foreclose a mortgage to the payment of delinquent property taxes.⁴⁷ Further, another provision of this

1998).

36. *Id.* § 11(d), 1996 Ind. Acts at 1505.

37. *Id.* § 11(b), 1996 Ind. Acts at 1504.

38. IND. CODE §§ 6-1.1-12-9, -11, -14, -17.4 (Supp. 1996) (retroactive to March 1, 1995).

39. Act of Mar. 21, 1996, No. 48, § 5, 1996 Ind. Acts 1401, 1405-07 (retroactive to March 1, 1992) (expired December 31, 1996).

40. IND. CODE § 6-1.1-10-31.7(c) (Supp. 1996) (retroactive to January 1, 1994).

41. *Id.* § 6-1.1-22-6.5 (effective March 14, 1996).

42. *Id.* § 6-1.1-23-1.5(b) (effective March 14, 1996).

43. *Id.* § 6-1.1-23-12 (effective March 14, 1996).

44. *Id.* § 6-1.1-24-2(a)(4).

45. *Id.* § 6-2.1-8-5(b) (effective July 1, 1996).

46. *Id.* § 6-2.1-8-5(a).

47. *Id.* § 34-1-53-12(2) (effective March 14, 1996).

law states that unclaimed money collected at the scene of a death must be deposited in the county general fund.⁴⁸ Still another provision allows any person with a substantial property interest of public record in Marion County, Allen County, or St. Joseph County to seek a refund of surplus money collected at a tax sale.⁴⁹ Further, this law decreases the period in which an owner of property sold at a tax sale can obtain a refund of money in the tax sale surplus fund from five years to three years.⁵⁰ Finally, a provision of this law changes to one month the waiting period for a tax deed in certain expedited tax sales.⁵¹

Ninth, the general assembly addressed various issues that affect local unit budget procedures. A provision of this law changes procedures concerning the formulation of budgets, tax levies, and tax rates for political subdivisions.⁵² Further, a provision of this law changes the date for township legislative body annual meetings from the second Tuesday after the first Monday in January to a date on or before the third Tuesday after the first Monday in January.⁵³ (The introduced version of this bill was prepared by the Local Budget Year Commission).

Tenth, the general assembly provided procedural guidance upon the filing of enterprise zone tax credit summaries. A provision of this law includes a cross reference in the law concerning enterprise zone inventory credits to the law that requires an applicant to file a summary of enterprise zone credits and exemptions with the enterprise zone board.⁵⁴ Further, another provision of this law validates the late filing in 1995 of a verified summary concerning the amount of enterprise zone tax credits applicable to certain inventory.⁵⁵

Eleventh, the general assembly gave allowances to certain members of the armed forces with respect to their vehicle registrations by providing that an Indiana resident who has registered a car in Indiana, is an active member of the Armed Forces of the United States, is assigned to a duty station outside Indiana, and *does not operate the motor vehicle* inside or outside Indiana is not required to register the motor vehicle, pay motor vehicle excise tax, or pay property tax on the motor vehicle.⁵⁶

Twelfth, the general assembly imposed several requirements which directly affect local taxation. A provision of this law increases from ten days to fifteen business days the time in which a county auditor may certify petitions for and remonstrances against leases and bond issues for controlled projects that are payable from property tax levies and involve more than \$2,000,000 in

48. *Id.* § 36-2-10-21 (effective March 14, 1996).

49. *Id.* § 6-1.1-24-7(a)(3) (effective March 14, 1996).

50. *Id.* § 6-1.1-24-7(c).

51. *Id.* § 6-1-1-25-4.5(a)(3) (effective March 14, 1996).

52. *Id.* §§ 6-1.1-17-1, -3, -5, 16 (effective January 1, 1997).

53. *Id.* § 36-6-6-9 (effective January 1, 1997).

54. *Id.* § 6-1.1-20.8-2(c) (effective March 21, 1996).

55. Act of Mar. 21, 1996, No. 55, § 2, 1996 Ind. Acts 1515, 1515-16 (effective March 21, 1996).

56. IND. CODE § 9-18-2-1 (Supp. 1996) (effective March 21, 1996).

expenditures.⁵⁷ Another provision of this law requires each petition and remonstrance form to include instructions specifying new requirements that the carrier and signer must be property owners, that the carrier must be a signer, that the carrier must attest to the signatures, and that the deadline for filing be set forth.⁵⁸ Also contained in this law is a provision that prohibits officers of a political subdivision from making a preliminary determination to issue bonds or enter into a lease for a controlled project that is not substantially different from a project that was defeated within one year of the defeat.⁵⁹ This law also specifies that withdrawing a bond petition has the same consequences as if the petition were defeated.⁶⁰ Further, this law allows residents of included towns within Washington Township in Marion County to pay the township fire property tax rate for fire service, rather than receiving the service under contract.⁶¹ This law also adjusts the maximum property tax levies of all affected units.⁶² Finally, this law makes a technical correction to clarify the fund from which refunds for overpayments of 1996 motor vehicle excise tax will be made.⁶³

In the area of probate tax law, the general assembly enacted six bills into law which have an impact on Indiana probate taxation. The first of these concerns trust holding professional corporations. A new section was added that states that “charitable remainder annuity trust” has the meaning set forth I.R.C. § 664(d)(1).⁶⁴ A related provision of this law provides that “charitable remainder unitrust” has the meaning set in I.R.C. § 664(d)(2) or I.R.C. § 664(d)(3).⁶⁵ Finally, this law allows shares of a professional corporation to be held by a charitable remainder annuity trust or a charitable remainder unitrust if the trust complies with each of the following conditions:

- (A) Has one or more current income recipients, all of whom are qualified persons;
- (B) Has a trustee or an independent special trustee who:
 - (i) is a qualified person, and
 - (ii) has exclusive authority over the shares of the professional corporation while the shares are held in the trust;
- (C) Has one or more irrevocably designated charitable remaindermen, all of which must at all times:
 - (i) be domiciled, or
 - (ii) maintain a local chapter, in Indiana.

57. *Id.* § 6-1.1-20-3.2(5) (effective March 21, 1996).

58. *Id.* § 6-1.1-20-3.2(3).

59. *Id.* § 6-1.1-20-3.2(6).

60. *Id.*

61. *Id.* § 36-8-13-3(c) (effective March 21, 1996).

62. *Id.* § 36-8-13-4.7 (effective March 21, 1996).

63. Act of Mar. 21, 1996, No. 54, § 6, 1996 Ind. Acts 1506, 1513-14. (This provision is retroactive to July 1, 1995, expires January 1, 1999 and is not codified.)

64. IND. CODE § 23-1.5-1-5.4 (Supp. 1996) (effective July 1, 1996).

65. *Id.* § 23-1.5-1-5.6 (effective July 1, 1996).

(D) When distributing any assets during the term of the trust to charitable organizations, the distributions are made only to charitable organizations described in Section 170(c) of the Internal Revenue Code that:

- (i) are domiciled, or
- (ii) maintain a local chapter, in Indiana.⁶⁶

Second, the general assembly made allowances and included additions to the law which affect changes in a corporate trustee. A provision of this law allows the beneficiary of a trust that is held by a corporate trustee and that is executed after June 30, 1996, to petition the court to have the corporate trustee removed if there has been a change in control of the corporate trustee.⁶⁷ This law also provides that, unless the trust instrument provides otherwise, a corporate trustee that acquires a trust as a result of a change in control may not decline to accept the trust property, resign as trustee, or otherwise refuse to administer the trust, based on the amount of property or funds in the trust.⁶⁸ This law also contains a provision that allows the court to remove the corporate trustee if the court determines the removal is in the best interests of all the beneficiaries.⁶⁹ Another provision of this law requires a court to inquire into the qualifications of a proposed successor trustee.⁷⁰ Finally, this law adds language concerning the circumstances under which a trustee that has acquired a trust as a result of a change in control may petition to be removed from the trust.⁷¹

Third, the general assembly advanced a procedural limit that bars a claim filed against an estate more than one year after the decedent's death.⁷² (The introduced version of this bill was prepared by the probate code study commission).

Fourth, the general assembly provided a procedural requirement as well as an exception that affects consents to transfer property. Specifically, a provision of this law requires written consent from the IDSR or the county assessor before a deceased person's property held in trust may be transferred.⁷³ Another provision of this law also makes an exception to the consent requirement if the transfer is to the surviving spouse of the deceased person.⁷⁴

Fifth, the general assembly established guidelines by including a provision in the Indiana inheritance tax law that transfers the responsibility for collecting delinquent inheritance tax from the county prosecuting attorney to the IDSR.⁷⁵

66. *Id.* § 23-1.5-1-13(3).

67. *Id.* § 30-4-3-29 (effective July 1, 1996).

68. *Id.* § 30-4-3-29.5(a) (effective July 1, 1996).

69. *Id.* § 30-4-3-29(e).

70. *Id.* § 30-4-3-29(c).

71. *Id.* § 30-4-3-29.5(b).

72. *Id.* § 29-1-7-7(d) (effective July 1, 1996).

73. *Id.* § 6-4.1-8-4(b) (effective March 10, 1996); *see id.* § 6-4.1-8-4(c) (exception where transfer will result in no Indiana inheritance or estate tax).

74. *Id.* § 6-4.1-8-4(b).

75. *Id.* § 6-4.1-9-11 (effective March 10, 1996).

(The introduced version of this bill was prepared by the probate code study commission).

Sixth, the general assembly added a provision stating that the entire value of an irrevocable trust or an escrow established under current law that provides for payment of funeral, burial services, or merchandise in advance of need by a person who applies for or receives Medicaid may not be considered as a resource in determining the person's eligibility for Medicaid.⁷⁶

In the area of other relevant laws, the general assembly passed nine bills into law which have an impact on Indiana taxation. The first of these involves motor vehicle and boat transactions legislation. A provision of this law requires the Bureau of Motor Vehicles to issue boat excise tax decals at the time the tax is collected.⁷⁷ Another provision of this law permits licensed new motor vehicle dealers, financial institutions, and selected other persons to provide partial license branch services.⁷⁸ This law also contains a provision that requires at least one full service license branch in each county.⁷⁹ Further, a provision of this law requires the Bureau of Motor Vehicles Commission to adopt minimum standards for partial service contractors before January 1, 1997.⁸⁰ This law also includes a provision that requires the commission to establish standards for telephonic, facsimile, electronic, and computer access to branch services before March 1, 1997.⁸¹ Another provision included in this law permits cross county registration if it is not an in-person over the counter transaction.⁸² Also, a provision of this law requires the bureau to provide a monthly cross county collection report to each county treasurer and auditor.⁸³

Second, the general assembly changed poor relief administration. The law now provides that a person other than an attorney who receives anything of value for assisting an applicant to receive poor relief commits a Class C misdemeanor.⁸⁴ Another provision of this law also expands the authority and discretion of township trustees in the following areas: hiring;⁸⁵ action on poor relief applications;⁸⁶ information retrieval about poor relief recipients;⁸⁷ denial of aid;⁸⁸ services provided to recipients that will be paid for by poor relief funds;⁸⁹ and, other functions of the township trustee. This law also contains a provision that

76. *Id.* § 12-15-2-17 (effective March 10, 1996).

77. *Id.* § 6-6-11-13 (effective January 1, 1997).

78. *Id.* § 9-16-1-1(3) (effective July 1, 1996).

79. *Id.* § 9-15-2-1(6) (effective July 1, 1996).

80. *Id.* § 9-15-2-1(7).

81. *Id.* § 9-15-2-1(8).

82. *Id.* § 9-18-2-13 (effective July 1, 1996).

83. *Id.* § 6-6-5-9 (effective July 1, 1996).

84. *Id.* § 12-20-1-4(b) (effective July 1, 1996).

85. *Id.* § 12-20-4-3 (effective July 1, 1996).

86. *Id.* § 12-20-6-7 (effective July 1, 1996).

87. *Id.* § 12-20-7-1 (effective July 1, 1996).

88. *Id.* § 12-20-5.5-2(1) (effective July 1, 1996).

89. *Id.* § 12-7-2-20.5 (effective July 1, 1996).

requires township trustees to establish written standards for processing poor relief applications, and provides guidelines for these standards.⁹⁰ Further, a provision of this law extends most laws that apply to poor relief applicants to other members of the applicant's household and requires each board of county commissioners to develop uniform written standards regarding appeals from the denial of poor relief assistance.⁹¹ Finally, this law increases the amount of information and number of reports township trustees must file annually with the State Board of Accounts and repeals several statutes that govern township trustees' administrative responsibilities.⁹²

Third, the general assembly enacted legislation that affects tax-exempt bonding.⁹³ Previously, the Indiana Secondary Market for Education Loans had been allocated nine percent of the state's volume cap established by I.R.C. § 146. This allocation has been eliminated. This allocation has been transferred to the Indiana Development Finance Authority.⁹⁴ This law also contains a provision which allows the Indiana Development Finance Authority to operate the volume cap under guidelines established by the authority.⁹⁵ Finally, a provision of this law repeals various sections that deal with the administration of the volume cap program⁹⁶ and replaces references to "state ceiling" with the term, "volume cap."⁹⁷

Fourth, the general assembly introduced measures aimed at improving legislation in the area of transportation and special fuels. International Registration Plan enforcement is now conducted by the IDSR.⁹⁸ The law also makes changes in the area of special fuel taxation⁹⁹ and oversized and overweight vehicles.¹⁰⁰ Another provision of this law also specifies that interstate and intrastate motor carriers transporting persons or property throughout Indiana must comply with certain federal regulations that have been incorporated into state law.¹⁰¹ This law also contains a provision which specifies that to avoid the requirements of a federal regulation involving the maintenance of logs that has been incorporated into state law, a vehicle must be used as a farm truck.¹⁰² This law includes a provision that specifies that notwithstanding the requirements of a federal regulation that has been incorporated into state law, a person who is at least eighteen years of age but less than twenty-one years of age may be employed to

90. *Id.* §§ 12-20-5.5-1 to -6 (effective July 1, 1996).

91. *Id.* § 12-20-15-3(b) (effective July 1, 1996).

92. *Id.* § 12-20-28-3 (effective July 1, 1996).

93. *Id.* § 4-4-11.5-9(b) (effective January 1, 1997).

94. *See id.*

95. *Id.* §§ 4-14-11.5-39 to -43 (effective January 1, 1997).

96. Act of Mar. 15, 1996, No. 10, § 17, 1996 Ind. Acts 950, 957 (effective January 1, 1997).

97. IND. CODE § 4-4-11.5(d) (Supp. 1996) (effective January 1, 1997).

98. *Id.* § 9-28-4-6 (effective March 21, 1996).

99. *Id.* §§ 6-6-2.5-41(i), 62(c), -64(c)(1) (effective July 1, 1996).

100. *Id.* § 6-8.1-4-4 (effective March 21, 1996).

101. *Id.* § 8-2.1-24-18(b) (effective July 1, 1996) (amended 1997, to be recodified at IND. CODE § 8-2.1-24-18(a)).

102. *Id.*

operate a commercial motor vehicle intrastate.¹⁰³ Another provision included in this law makes changes to Indiana law concerning outdoor advertising to allow Indiana law to be in compliance with federal law.¹⁰⁴ Finally, a provision of this law eliminates the ninety-five-foot overall length restriction for manufactured home transports.¹⁰⁵

Fifth, the general assembly modified aspects of emergency planning and notification. A provision of this law specifies that money distributed by the IDSR from the Local Emergency Planning and Right to Know Fund that is used to enhance communication among local emergency planning committees and between local emergency planning committees and the Indiana State Emergency Response Commission is allocated to the Indiana State Emergency Response Commission and administered by the Department of Environmental Management.¹⁰⁶ Another provision of this law specifies that the notification requirements in the law concerning emergency planning and notification apply to the transportation, or storage incident to transportation, of an extremely hazardous substance.¹⁰⁷

Sixth, the general assembly provided legislation which affects mayoral appointments and the Lake County Convention & Visitor Bureau (Bureau). A provision of this law allocates a portion of the Lake County innkeeper's tax to the Bureau.¹⁰⁸ Another provision of this law requires the Bureau to establish a fund consisting of its allocation.¹⁰⁹ Also, this law contains a provision that requires the Bureau to elect a chairman and a vice chairman from among the Bureau's members.¹¹⁰ This law includes a provision which provides for the appointment of members of the board of directors of the Hammond Port Authority.¹¹¹ Another provision included in this law provides that an appointed board member of a political subdivision may only serve sixty days after the expiration of the member's term, even if the appointing authority has not appointed a successor.¹¹² Further, a provision of this law makes conforming changes in statutes governing specific boards of political subdivisions, including mayoral appointments to the board of public works and safety of a second or third class city.¹¹³

Seventh, the general assembly modified prior legislation relating to controlled substance offenses by changing the controlled substance excise tax law. A provision of this law specifies that the amount of the controlled substance excise

103. *Id.* § 8-2.1-24-18(g) (effective July 1996).

104. *Id.* § 8-23-1-43 (retroactive to January 1, 1996).

105. *Id.* § 9-13-2-171(1) (effective March 21, 1996).

106. *Id.* § 6-6-10-7 (effective July 1, 1996).

107. *Id.*

108. *Id.* § 6-9-2-2 (effective July 1, 1996).

109. *Id.* § 6-9-2-2(b).

110. *Id.* § 6-9-2-3(m) (effective July 1, 1996).

111. *Id.* § 8-10-5-5 (effective March 21, 1996).

112. *Id.* § 36-4-11-2(f) (effective July 1, 1996).

113. *Id.* §§ 36-4-9-6, -8 (effective July 1, 1996).

tax is: on each gram of marijuana, \$3.50 for each gram¹¹⁴ and a proportionate amount for each fraction of a gram; on each pill, capsule, hit, rock, or dosage of a schedule I, II, or III controlled substance, \$40;¹¹⁵ on each pill, capsule, hit, rock, or dosage of a schedule IV controlled substance, \$20;¹¹⁶ on each pill, capsule, hit, rock, or dosage of schedule V controlled substance, \$10.¹¹⁷ Further, a provision of this law extends the period for which evidence of payment of tax issued by the IDSR is effective from forty-eight hours to thirty days.¹¹⁸ Another provision of this law removes a provision that made it a Class D felony for a person to knowingly or intentionally deliver, possess, or manufacture a controlled substance without having paid the controlled substance excise tax that was due.¹¹⁹ This law also contains a provision which gives a court the discretion of ordering the IDSR to commence collection proceedings for the tax and penalties if the court finds that a defendant has not paid the tax.¹²⁰ Further, a provision of this law allows the IDSR to commence collection proceedings if the prosecuting attorney notifies the IDSR in writing that the prosecutor does not intend to pursue criminal charges of delivery, possession, or manufacture of the controlled substance that may be subject to tax.¹²¹ This law includes a provision that specifies that the controlled substance tax is intended to be in addition to certain criminal penalties.¹²² Another provision included in this law removes juvenile court jurisdiction over children at least sixteen years of age charged with violating certain controlled substance statutes.¹²³ Finally, this law provides that a family housing complex, for purposes of criminal law, is a building or series of buildings that contains at least twelve dwelling units from which children are not excluded by means of prominently displayed signage.¹²⁴ This law raises the penalties for dealing or possessing: a controlled substance; cocaine; a narcotic drug; marijuana; hash oil; or, hashish if the offense is committed in, on, or within 1000 feet of a family housing complex.¹²⁵

Eighth, the general assembly included legislation that affects public finance. A provision of this law increases the homestead credit against property taxes from 4% to 8% for 1996, and from 4% to 6% for 1997.¹²⁶ Another provision of this law retroactively accelerates to the 1996 registration year the motor vehicle excise tax

114. *Id.* § 6-7-3-6(b)(2) (effective July 1, 1996).

115. *Id.* § 6-7-3-6(b)(3).

116. *Id.* § 6-7-3-6(b)(5).

117. *Id.* § 6-7-3-6(b)(7).

118. *Id.* § 6-7-3-10(b) (effective July 1, 1996).

119. Act of Mar. 14, 1996, No. 65, § 4, 1996 Ind. Acts 1579, 1580-81.

120. IND. CODE § 6-7-3-18 (Supp. 1996).

121. *Id.* § 6-7-3-19 (effective July 1, 1996).

122. *Id.* § 6-7-3-20 (effective July 1, 1996).

123. *Id.* § 31-6-2-1.1(c)(12) to -(14) (effective July 1, 1996) (repealed 1997) (to be recodified at IND. CODE § 31-30-1-4(a)).

124. *Id.* § 35-41-1-10.5 (effective July 1, 1996).

125. *Id.* §§ 35-48-4-1 to -10 (effective July 1, 1996).

126. *Id.* § 6-1.1-20.9-2(d) (retroactive to January 1, 1996).

schedule applicable to the 2001 registration year and provides for a refund of excise tax overpayments made in 1996.¹²⁷ This law contains a provision that appropriates \$200,000,000 to the Pension Stabilization Fund from the State General Fund,¹²⁸ and it also appropriates \$50,000,000 to the Pension Relief Fund from the State General Fund.¹²⁹ Also, this law changes the formula for distribution of money under the “m” portion of the Pension Relief Fund.¹³⁰ Another provision of this law accelerates the amount payable from the property tax relief fund to political subdivisions so that all distributions currently required in April, May, and June are payable in March, April, and May.¹³¹ Another provision of this law makes an appropriation from the State General Fund in the amounts needed, if any, to transfer the full \$30,000,000 annual appropriation to the Local Road and Street Account and the full \$20,000,000 annual appropriation to the Indiana Technology Fund.¹³² This law includes a provision that requires pari-mutuel wagering taxes and surplus money in the Charity Gaming Enforcement Fund to be transferred to the lottery and gaming surplus account in the build Indiana fund.¹³³ Another provision included in this law changes the date after which certain university building projects are eligible for fee replacement appropriations from July 1, 1999, to July 1, 1997.¹³⁴ Finally, this law changes the effective date of several provisions in the budget bill enacted in 1995 to change the date when certain university capital projects are authorized.¹³⁵

Ninth, the general assembly imposed requirements and provided allowances that affect local government taxation. A provision of this law requires the legislative body of a municipality outside Marion County to hold a public hearing before adopting an annexation ordinance.¹³⁶ Another provision of this law allows municipalities to abate the property tax liability of property owners in annexed territory for not more than three years after an annexation occurs.¹³⁷ A provision included in this law specifies that if a judgment is adverse to annexation, a municipality outside Marion County may not attempt to annex territory less than two years after the latest of certain events.¹³⁸ Another provision included in this law allows Greene Township in St. Joseph County and Deer Creek Township in Miami County to appeal to the Local Government Tax Control Board to adjust the townships’ 1997 maximum ad valorem property tax General Fund and

127. *Id.* § 6-6-5-5(c) (retroactive to January 1, 1996).

128. Act of Feb. 22, 1996, No. 26, § 18, 1996 Ind. Acts 1163, 1189 (expires July 1, 1997).

129. *Id.* § 19, 1996 Ind. Acts at 1189 (expires July 1, 1997).

130. IND. CODE § 5-10.3-11-4 (Supp. 1996) (effective January 1, 1997).

131. *Id.* § 6-1.1-2-10(c) (retroactive to January 1, 1996).

132. Act of Feb. 22, 1996, No. 26, § 11, 1996 Ind. Acts at 1186 (expires July 1, 1997).

133. IND. CODE § 4-31-9-3 (Supp. 1996) (retroactive to January 1, 1996).

134. Act of Feb. 22, 1996, No. 26, § 13, 1996 Ind. Acts at 1187 (effective July 1, 1997).

135. *Id.* §§ 14-15, 1996 Ind. Acts at 1187 (effective July 1, 1997).

136. IND. CODE § 36-4-3-2.1 (Supp. 1996) (effective July 1, 1996).

137. *Id.* § 36-4-3-8.5(b)(1) (effective July 1, 1996).

138. *Id.* § 36-4-3-15 (effective July 1, 1996).

Firefighting Fund levies.¹³⁹ Finally, this law contains a provision which allows Decatur County to use E-911 funds to pay for emergency communication costs.¹⁴⁰

II. INDIANA TAX COURT OPINIONS AND DECISIONS

The tax court published twelve opinions during 1996,¹⁴¹ the most interesting of which are discussed below. The opinions are presented under an alphabetical listing of the Indiana taxes involved in each case.

A. *Indiana Income Taxes—Indiana Gross Income Tax (IGIT)*

In *UACC Midwest, Inc. v. Indiana Department of State Revenue*,¹⁴² the taxpayer, a cable television operator, appealed a final determination of the Department of Revenue finding that UACC's gross income should be taxed at the rate of one and two-tenths percent (1.2%) rather than at the rate of three-tenths of one percent (0.3%).¹⁴³

The Indiana Gross Income Tax Act imposes a tax upon the receipt of: "(1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and (2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana."¹⁴⁴ The gross income tax is imposed at one of two rates: 0.3% or 1.2%.¹⁴⁵ In determining which of the two rates is to be applied, "the type of transaction from which the taxable gross income is received" governs.¹⁴⁶ Gross income received from, inter alia, selling at retail is taxed at the 0.3% rate.¹⁴⁷ The

139. Act of Mar. 21, 1996, No. 231, § 4, 1996 Ind. Acts 2747, 2749.

140. *Id.* § 5 (expires July 1, 1998).

141. During 1996, the tax court had issued the following twelve published opinions, as of November 8, 1996, which opinions are listed chronologically: *Boshart v. State Bd. of Tax Comm'rs*, 672 N.E.2d 499 (Ind. T.C. 1996); *State ex rel. ANR Pipeline Co. v. Indiana Dep't of State Revenue*, 672 N.E.2d 91 (Ind. T.C. 1996); *Vonnegut v. State Bd. of Tax Comm'rs*, 672 N.E.2d 87 (Ind. T.C. 1996); *National Ass'n of Miniature Enthusiasts v. State Bd. of Tax Comm'rs*, 671 N.E.2d 218 (Ind. T.C. 1996); *Monarch Steel Co. v. State Bd. of Tax Comm'rs*, 669 N.E.2d 199 (Ind. T.C. 1996); *Raintree Friends Housing, Inc. v. Indiana Dep't of State Revenue*, 667 N.E.2d 810 (Ind. T.C. 1996); *UACC Midwest, Inc. v. Indiana Dep't of State Revenue*, 667 N.E.2d 232 (Ind. T.C. 1996); *Town of St. John v. State Bd. of Tax Comm'rs*, 665 N.E.2d 965 (Ind. T.C.), *rev'd sub nom.* 675 N.E.2d 318 (Ind. 1996); *Encyclopaedia Britannica, Inc. v. State Bd. of Tax Comm'rs*, 663 N.E.2d 1230 (Ind. T.C. 1996); *Storm, Inc. v. Indiana Dep't of State Revenue*, 663 N.E.2d 552 (Ind. T.C. 1996); *Riley at Jackson Remonstrance Group v. State Bd. of Tax Comm'rs*, 663 N.E.2d 802 (Ind. T.C. 1996); *Indiana Hi-Rail Corp. v. State Bd. of Tax Comm'rs*, 660 N.E.2d 1084 (Ind. T.C. 1996).

142. 667 N.E.2d 232 (Ind. T.C. 1996).

143. See IND. CODE § 6-2.1-2-3 (1993).

144. *Id.* § 6-2.1-2-2 (1993).

145. *Id.* § 6-2.1-2-3.

146. *Id.* § 6-2.1-2-2.

147. *Id.* § 6-2.1-2-4.

1.2% rate, however, applies to gross income received from, inter alia, the provision of services.¹⁴⁸ UACC claimed that its income should be taxed at the rate of 0.3% rather than 1.2% because it is received in the course of “selling at retail” under section 6-2.1-2-4, and not from “the provision of a service” under section 6-2.1-2-5. In other words, UACC argued that its income is derived from the sale of cable television programming.

The tax court found that, for purposes of the Gross Income Tax Act, the term, “selling at retail,” has a definition that does not include the sale of cable television programming.¹⁴⁹ Selling at retail means a transaction in which a retail merchant in the ordinary course of his regularly conducted business transfers the ownership of *tangible personal property* to another.¹⁵⁰ Under this definition, UACC is not “selling at retail” because cable television programming is not tangible personal property; therefore, UACC’s income is derived from the provision of a service, which income is subject to the 1.2% rate.

UACC also argued that Indiana’s Gross Income Tax Act, as applied to cable television operators, violates several United States and Indiana constitutional protections. First, UACC maintained that it was being denied equal protection of the law under the Fourteenth Amendment and article I, section 23 of the Indiana Constitution. More specifically, UACC argued that it is similarly situated to conventional television broadcasters and/or telephone and telegraph companies. In Indiana, the gross income of conventional television broadcasters is either wholly exempt from taxation,¹⁵¹ or taxed at the rate of 0.3%;¹⁵² telephone and telegraph companies are exempt from taxation altogether under the Commerce Clause. The tax court found, however, that UACC is not similarly situated to conventional television broadcasters or telephone and telegraph companies because it receives its income from different sources.¹⁵³ Specifically, UACC receives its income by charging its viewers for cable television programming—the provision of a local service¹⁵⁴ (only residents of Indiana subscribe to, and pay for, UACC’s programming). Conventional television broadcasters receive their income from non-viewer sources, such as media advertising.¹⁵⁵ Telephone and telegraph companies receive their income from consumers who make phone calls—an activity which triggers simultaneous activity in several states and which is not a purely local event.¹⁵⁶ Consequently, the Indiana Gross Income Tax Act did not violate UACC’s equal protection rights.

Next, UACC argued that the Indiana Gross Income Tax Act violates the

148. *Id.* § 6-2.1-2-5 (Supp. 1996).

149. *See id.* § 6-2.1-2-1(b)(1) (1993); *see also* IND. ADMIN. CODE tit. 45, r. 1-1-13 (1996).

150. *See* IND. CODE § 6-2.1-2-1(b)(1).

151. *See id.* § 6-2.1-3-28 (1993).

152. *See id.* § 6-2.1-2-4(2).

153. *UACC Midwest v. Indiana Dep’t of State Revenue*, 667 N.E.2d 232, 239 (Ind. T.C. 1996).

154. *See id.*

155. *See id.*

156. *See id.* at 238-40.

expressive activities of cable television operators protected by the First Amendment. Specifically, UACC argued that the Indiana Gross Income Tax Act singles out cable television operators for payment of taxes at a higher rate, while other identically situated electronic speakers (i.e., local network affiliates, wireless broadcasters, and radio operators) pay taxes at a lower rate.

The tax court resolved this argument easily “Indiana’s gross income tax is a tax of general applicability. It applies to the receipt of all income from the sale of tangible personal property and a broad range of services.”¹⁵⁷ Indiana’s gross income tax does not single out the press or raise concerns about censorship of critical ideas and opinions.¹⁵⁸ Similarly, Indiana’s gross income tax is also not content-based.¹⁵⁹ Indeed, nothing in the tax’s imposition statutes refers to the content of media communications. Because the Indiana Gross Income Tax Act does not discriminate on the basis of ideas, but only on the source of income, the tax court found that it does not violate the protections afforded to UACC under the First Amendment.¹⁶⁰

Finally, UACC argued that the Indiana Gross Income Tax Act conflicts with, and is preempted by, the Cable Communications Policy Act of 1984 (the Cable Act).¹⁶¹ Specifically, UACC argued that Indiana’s gross income tax constitutes an unduly discriminatory “franchise fee” prohibited under the Cable Act. The tax court disagreed, finding that although the Cable Act protects cable operators from excessive “franchise fees”¹⁶² imposed by state and local governments, the act does not cover “any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers).”¹⁶³

B. Indiana Carrier Fuel Taxes—Indiana Special Fuel Tax

In *Storm, Inc. v. Indiana Department of State Revenue*,¹⁶⁴ the tax court held that, in the absence of a written agreement, special fuel dealers (i.e. station operators) are liable to the Department for special fuel taxes on the special fuel that they deliver or place into the fuel supply tanks of motor vehicles in Indiana.

C. Indiana Procedures For Tax Administration—Indiana Department of State Revenue (IDSR)

157. *Id.* at 242.

158. *See id.* (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

159. *Id.*

160. *Id.*

161. Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended at scattered sections of U.S.C.).

162. *See* 47 U.S.C. § 542(g)(1) (1994) (A “franchise fee” is defined as “any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator . . . solely because of [its] status as such.”).

163. *UACC Midwest*, 667 N.E.2d at 242 (quoting 47 U.S.C. § 542(g)(2) (1994)).

164. 663 N.E.2d 552 (Ind. T.C. 1996).

In *State ex rel. ANR Pipeline Co. v. Indiana Department of State Revenue*,¹⁶⁵ the issue was whether the IDSR had the authority to revoke a Letter of Findings. The taxpayer had protested an unfavorable audit report received from the IDSR. The IDSR, in response, issued a Letter of Findings sustaining the taxpayer's protest. Subsequently, the IDSR issued a second Letter of Findings (second Letter), reversing the position it had taken in the first Letter of Findings (first Letter). The IDSR stated in the second Letter that the purpose of the second Letter was: (1) to correctly state the IDSR's position as it related to the issue that affected the taxpayer, and (2) to revoke the first Letter. The taxpayer claimed that the first Letter was a final determination of the IDSR that could not be revoked or modified by the IDSR.

At the outset, the tax court found that the first Letter was a proper exercise of the IDSR's authority and constituted a final determination.¹⁶⁶ The IDSR argued that, even if the first Letter was a final determination, the IDSR possessed the power to vacate the first Letter because the first Letter was based on a mistake of law, and the IDSR had the authority to issue the second Letter to correct that mistake of law. The tax court disagreed with this notion, finding that: (1) because administrative agencies (such as the IDSR) are creations of the legislature, they generally cannot exercise powers beyond those specifically granted by the general assembly;¹⁶⁷ (2) all doubts regarding a claim to power by a governmental agency are resolved against the agency;¹⁶⁸ and (3) administrative bodies may not usually rescind their final determination absent some statutory provision granting that authority.¹⁶⁹ Of course, as the tax court noted, this rule is not absolute in all cases, for "[w]hen an administrative agency recognizes its own error of law, it may correct that error."¹⁷⁰ However, the IDSR had failed to cite to a statute, legal principle, or change in case law that was neglected or misapplied to the facts, which citation would have been necessary in order to show that an error of law had occurred.

The IDSR also argued that because it could have denied the taxpayer's request in the first Letter, it should be permitted to revoke its approval of that request, whether through a second Letter or otherwise. The tax court found this argument no more persuasive today than it was to the Indiana Supreme Court in 1926 when the high court explained that the "power to undo an act once done will not be implied from the mere grant of power, in the exercise of a sound discretion, to do the act."¹⁷¹ "[A]n act once done . . . cannot be undone and nullified unless the

165. 672 N.E.2d 91 (Ind. T.C. 1996).

166. *Id.* at 94.

167. *Id.* (citing *Auburn Foundry, Inc. v. State Bd. of Tax Comm'rs*, 628 N.E.2d 1260, 1263 (Ind. T.C. 1994)).

168. *Id.* (citing *Adkins v. City of Tell City*, 625 N.E.2d 1298, 1302 (Ind. Ct. App. 1993)).

169. *Id.* (citing *Auburn Foundry*, 628 N.E.2d at 1263).

170. *Id.* (citing *Adkins*, 625 N.E.2d at 1302).

171. *Cress v. State*, 152 N.E. 822, 826 (Ind. 1926).

power to undo it has been reserved.”¹⁷² In other words, absent clear authority from the legislature, the IDSR may not revoke a final determination merely because it has a change of heart.¹⁷³ Because the IDSR failed to cite to any such authority, the tax court was obligated to resolve the claim against the IDSR.

The tax court also noted that even if the circumstances of this particular case would have permitted the IDSR to revisit its first decision, the IDSR would have forfeited any such authority by failing to act within a reasonable amount of time.¹⁷⁴ In Indiana, a reasonable period of time has been defined, in this context, as “co-extensive with the time allowed by the controlling statute for review.”¹⁷⁵ A taxpayer has one hundred eighty days after the date on which a Letter of Findings is issued in which to seek an appeal.¹⁷⁶ In this case, the IDSR had issued the second Letter eleven months after the first Letter and five months after the time provided for taking an appeal.

D. Indiana Procedures for Tax Administration—Indiana State Board of Tax Commissioners (ISBTC)

In *Riley at Jackson Remonstrance Group v. State Board of Tax Commissioners*,¹⁷⁷ the tax court ruled that the Director of the Indiana Department of Education’s Division of School Facility Planning, and not the ISBTC, is responsible for determining compliance with section 20-5-52-2(a) of the Indiana Code (whether a proper “1028” hearing has been held in the context of school building construction, repair and/or alteration).¹⁷⁸ The statute itself is silent as to whether it is the ISBTC or the Department of Education which has the responsibility for determining whether a proper 1028 hearing has been held.¹⁷⁹ However, the ISBTC and the Department of Education had issued a joint memorandum stating that the Department of Education’s Division of Accreditation and Facility Planning would be responsible for determining compliance with the 1028 public hearing requirement. The tax court gave special emphasis to the fact that “a long adhered-to administrative interpretation [of a statute] dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts.”¹⁸⁰ Accordingly, the tax court found that on these

172. *Id.* at 826.

173. *ANR Pipeline*, 672 N.E.2d at 95.

174. *See* *Indiana Civil Rights Comm’n v. Indiana Dep’t of Aging & Community Servs.*, 529 N.E.2d 872, 876 (Ind. Ct. App. 1988); *Dale Bland Trucking, Inc. v. Calcar Quarries, Inc.*, 417 N.E.2d 1157, 1160 (Ind. Ct. App. 1981).

175. *See Dale Bland*, 417 N.E.2d at 1160.

176. IND. CODE § 6-8.1-5-1(g) (1993).

177. 663 N.E.2d 802 (Ind. T.C. 1996).

178. The public hearing required called a “1028” hearing because it came to be law via House Bill 1028. *See id.* at 804 n.1.

179. IND. CODE § 20-5-52-2 (1993).

180. *Riley*, 663 N.E.2d at 806 (quoting *Indiana Dep’t of State Revenue v.*

facts a presumption existed that the legislature had acquiesced in the two agencies' interpretation of the statute because: (1) the joint memorandum was issued just two months after the statute became effective, and (2) in the fourteen years that the statute had been in existence, the legislature had taken no action to change or amend it.

E. Indiana Property Taxes—Business Personal Property Tax

In *Encyclopaedia Britannica, Inc. v. State Board of Tax Commissioners*,¹⁸¹ Encyclopaedia Britannica (EB), the renowned encyclopedia publisher, appealed a final determination of the ISBTC denying EB an inventory exemption from Indiana's business personal property tax for the March 1, 1993 assessment date.

In preparing its encyclopedias for publication, EB sends new and/or revised editions to various companies for printing and binding. One such company was R.R. Donnelley & Sons (RRD), located in Crawfordsville, Indiana. EB had hired RRD as an independent contractor to print, bind, and mass produce some of its books. RRD placed completed books into shipping boxes and stored them in its warehouse until EB directed that they be shipped to certain locations. EB directed and controlled RRD's printing and binding work to the extent that EB: (1) established a mandatory production schedule, (2) established mandatory product specifications, (3) inspected the quality of materials supplied and used by RRD, and (4) inspected samples of both work in progress and completed books.

EB claimed that the books stored in RRD's warehouse on the March 1, 1993, assessment date were exempt from taxation under section 6-1.1-10-29(b) of the Indiana Code, which provides: "Personal property owned by a manufacturer or processor is exempt from property taxation if the owner is able to show by adequate records that the property is stored and remains in its original package in an in-state warehouse for the purpose of shipment, without further processing, to an out-of-state warehouse." The ISBTC, however, maintained that EB's books were not exempt from taxation because EB was not the "manufacturer" or "processor" of the books.

The terms "manufacturer" and "processor," as they are used in section 6-1.1-10-29(b), are defined as: "a person that performs an operation or continuous series of operations on raw materials, goods, or other personal property to alter the raw materials, goods, or other personal property into a new or changed state or form. The operation may be performed by hand, machinery, or a chemical process directed or controlled by an individual."¹⁸² Relying on this definition, EB argued that it (EB) was the "manufacturer" or "processor" of the books at issue because it performed a series of operations necessary to create the books. In the alternative, EB argued that it must be considered the "manufacturer" or "processor" of the books at issue because it directed or controlled RRD's manufacturing operations. The tax court rejected both arguments.

Glendale-Glenbrook Assoc., 429 N.E.2d 217, 219 (Ind. 1981)).

181. 663 N.E.2d 1230 (Ind. T.C. 1996).

182. IND. CODE § 6-1.1-10-29(a) (Supp. 1996).

The tax court found that, although there was no doubt that EB performed a series of operations (editorial work) necessary to create the books at issue, such operations were not performed on raw materials, goods, or other tangible personal property as required by section 6-1.1-10-29(a).¹⁸³

EB insisted it took already existing, outdated books and, by performing editorial work, changed them into revised, updated books. The tax court disagreed and, relying on a literal reading of the statute, concluded that EB's editorial work did not consist of manual, mechanical, or chemical operations performed on books.¹⁸⁴ Rather, EB's editorial work was an intellectual or cerebral operation performed by composing and arranging facts, ideas, and words.¹⁸⁵

EB also insisted that the language "directed or controlled by an individual" in section 6-1.1-10-29(a) established that persons who relegate manufacturing work to others are entitled to claim the exemption provided by section 6-1.1-10-29(b)—so long as those persons direct and control the others' work. In essence, EB was encouraging the tax court to read section 6-1.1-10-29(a) as conferring the status of "manufacturer" on two types of persons: (1) persons who themselves perform manufacturing work, and (2) persons who direct and control the manufacturing work they relegate to others. The tax court rejected such a reading, finding the language of the statute unambiguous.

The first sentence of section 6-1.1-10-29(a) provides that in order for a person to qualify as a "manufacturer" or "processor," that person must perform "an operation or continuous series of operations on raw materials, goods, or other [tangible] personal property to alter the raw materials, goods, or other [tangible] personal property into a new or changed state or form." The second sentence in section 6-1.1-10-29(a) provides that the operation or continuous series of operations referred to in the first sentence of section 6-1.1-10-29(a) may be performed by: (1) hand, (2) machinery, or (3) a chemical process directed or controlled by an individual.

The tax court held that the second sentence of section 6-1.1-10-29(a) did not extend the status of "manufacturer" or "processor" to persons who "direct and control" the manufacturing work they relegate to others. Rather, the second sentence simply explained that the term "operation," as used in the first sentence, is not limited to manual operations, but includes mechanical operations and chemical operations performed by individuals as well.¹⁸⁶

Interestingly, section 6-1.1-10-29 was amended on March 10, 1996. The amendment added the following emphasized language:

As used in this section, "manufacturer" or "processor" means a person that performs an operation or continuous series of operations on raw materials, goods, or other personal property to alter the raw materials, goods, or other personal property into a new or changed state or form.

183. *Encyclopaedia Britannica*, 663 N.E.2d at 1233.

184. *Id.*

185. *Id.*

186. *Id.* at 1234.

The operation may be performed by hand, machinery, or a chemical process directed or controlled by an individual. The terms include a person that: (1) dries or prepares grain for storage or delivery; or (2) *publishes books or other printed materials*.¹⁸⁷

This amendment to was effective retroactive to January 1, 1996, however, and so was not applicable to EB's 1993 assessment.

F. Indiana Real Property Taxes—Tax On Public Utility Companies' Distributable Property

In *Indiana Hi-Rail Corporation v. State Board of Tax Commissioners*,¹⁸⁸ Indiana Hi-Rail Corporation (IHR), a railroad company with real and personal property located in Indiana, challenged the ISBTC's final determination assessing its distributable property.¹⁸⁹

Over a number of years IHR received federal grant money, which was used to purchase property such as rail, ties, and ballasts (grant property). IHR recorded the acquisition cost of the grant property in its books, and included the grant property in the statement it filed with the ISBTC for the March 1, 1994, assessment date. Additionally, IHR spent money repairing a bridge that it owns, which expenditure was recorded on its books as a capital expenditure.

For the March 1, 1994, assessment date, the ISBTC issued a tentative assessment of IHR's distributable property. In arriving at its tentative assessment, the ISBTC was required to calculate IHR's unit value,¹⁹⁰ and in calculating IHR's unit value, the ISBTC utilized the cost of the grant property and bridge work as recorded in IHR's books.

IHR objected to the tentative assessment for two reasons. First, IHR argued that the ISBTC relied solely on the book cost of the grant property and ignored the fact that a portion of the value of the grant property was subject to the federal government's "constructive beneficial interest" which, IHR insisted, is not taxable.¹⁹¹ The tax court held that, regardless of whether United States fully or partially owned the grant property, the ISBTC "had authority to assess IHR for the grant property based on the fact that IHR uses it."¹⁹² "[A] State may . . . raise

187. IND. CODE § 6-1.1-10-29(a)(2).

188. 660 N.E.2d 1084 (Ind. T.C. 1996).

189. Distributable property is "property owned or used by a public utility company that is not locally assessed real property or locally assessed personal property." See IND. ADMIN. CODE tit. 50, r. 5.1-1-9 (1996).

190. "The term 'unit value' means the total value of all property owned or used by a public utility company." IND. CODE § 6-1.1-8-2(16) (1993).

191. The property of the United States and its agencies and instrumentalities is exempt from property taxation to the extent that this state is prohibited by law from taxing it. However, any interest in tangible property of the United States shall be assessed and taxed to the extent this state is not prohibited from taxing it by the Constitution of the United States. *Id.* § 6-1.1-10-1(a).

192. *Indiana Hi-Rail*, 660 N.E.2d at 1088 (citing IND. CODE 6-1.1-8-1 (1993)). The property owned or used by a public utility company shall be taxed in the manner prescribed in this chapter.

revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed.”¹⁹³

Second, IHR asserted that the value of the work performed on the bridge was not assessable because it was not a “betterment,”¹⁹⁴ or, alternatively, that if the value of the work performed on the bridge was assessable, then it should have been adjusted to account for abnormal obsolescence. Due to the standard of review for cases involving public utility companies who appeal a final determination of the ISBTC,¹⁹⁵ the tax court deferred to the ISBTC’s determination that the repair work performed on the bridge was assessable as a “betterment.”¹⁹⁶ As for the abnormal obsolescence adjustment, the tax court found that, because the bridge was repaired and fully restored to service prior to the March 1, 1994 assessment, IHR was not entitled to an abnormal obsolescence adjustment.¹⁹⁷

IHR also attempted, unsuccessfully, to persuade the tax court that the methodology employed by the ISBTC to assess IHR’s property violated Indiana law and/or the Equal Protection Clause.

G. Indiana Property Taxes—Real Property Taxes

In *Vonnegut v. State Board of Tax Commissioners*,¹⁹⁸ the taxpayer appealed a final determination of the ISBTC assessing his residential land, which land is located on the corner of Spring Mill Road and on the edge of the Spring Mill Court Subdivision. Specifically, the taxpayer maintained that a Land Order—promulgated by the Marion County Land Valuation Commission and the ISBTC and used to assess the taxpayer’s property—was inequitable because the base rates of nearly identical properties, located on the opposite side of Spring Mill Road but still in the taxpayer’s neighborhood, were \$100 less per front foot. The ISBTC argued that the values were correctly determined according to the plat map for the Spring Mill Court Subdivision, and that although properties on the opposite side of Spring Mill Road were in the same neighborhood, they were not in the same subdivision and therefore were irrelevant to the taxpayer’s appeal. The tax court, siding with the taxpayer, referred to some of its own prior cases to reemphasized the importance of considering the value of surrounding properties in the same “neighborhood,” not just the same subdivision, when conducting

Property used by a public utility company consists of property which the company uses under an agreement whereby the company exercises the beneficial rights of ownership for the major part of a year). IND. CODE § 6-1.1-8-1.

193. See *United States v. County of Fresno*, 429 U.S. 452, 462 (1977).

194. See IND. ADMIN. CODE tit. 50, r. 5.1-6-2(e) (1996).

195. See IND. CODE § 6-1.1-8-32 (1993).

196. *Indiana Hi-Rail*, 660 N.E.2d at 1089.

197. *Id.* See IND. ADMIN. CODE tit. 50, r. 5.1-11-1 (1996).

198. 672 N.E.2d 87 (Ind. T.C. 1996).

assessments.¹⁹⁹ The tax court also referred to the ISBTC's own regulations, which have a similar emphasis.²⁰⁰ Because the ISBTC failed to consider comparable properties outside of the taxpayer's subdivision in making its assessment, the tax court found that the ISBTC had acted in an arbitrary and capricious manner, which constituted an error of law.

H. Charitable Exemption From Indiana Taxes

1. *Raintree Friends Housing, Inc. v. Indiana Department of State Revenue*.²⁰¹—In *Raintree Friends*, Raintree Friends Housing and Jamestown Friends Housing (the Corporations) appealed final determinations of the IDSR assessing them with gross income tax, sales tax, and food and beverage tax. The issue before the tax court was whether the Corporations are organized and operated exclusively for charitable purposes, and thus are exempt from Indiana's gross income tax, sales tax, and food and beverage tax.

Prior to the dispute with the IDSR, the Corporations had received recognition as not-for-profit, tax-exempt charitable organizations under section I.R.C. § 501(c)(3), and, accordingly, did not owe federal income tax for the periods at issue.

The Corporations also received not-for-profit status from the IDSR based upon the IRS 501(c)(3) ruling. However, after conducting an audit the IDSR determined that the Corporations did not qualify for tax-exempt status in Indiana. The IDSR did not dispute the Corporations' not-for-profit status nor the fact that the Corporations do not use gross income for private benefit or gain. The IDSR did, however, dispute the contention that the Corporations are operated exclusively for charitable purposes.

The Corporations argued that they exist solely to care for the elderly (a charitable purpose), and that such care benefits society by relieving a burden society would otherwise shoulder. For example, the Corporations cater to the elderly, and do not accept individuals younger than age fifty-five; each apartment is equipped with hallway and bathroom grab bars, as well as emergency pull cords and smoke detectors which alert the twenty-four-hour support services office; some of the apartments are specially designed to accommodate persons in wheel chairs; on-site cafeterias serve three meals each day seven days a week; qualified nurses aids or L.P.N.s are on staff to assist residents with their medications and

199. See *id.* at 90 (citing *Simmons v. State Bd. of Tax Comm'rs*, 642 N.E.2d 559, 561-62 (Ind. T.C. 1994); *Western Select Properties v. State Bd. of Tax Comm'rs*, 639 N.E.2d 1068, 1074 (Ind. T.C. 1994)).

200. *Id.* "The County Land Valuation Commission should use plat maps or recorded plats as land value maps. . . . Each *neighborhood* can be delineated based on characteristics that distinguish it from surrounding neighborhoods, such as value ranges of improvements, zoning, or other restrictions on land use. *Neighborhood* boundaries may be drawn based on these kinds of characteristics, or may coincide with major roads, waterways, or other geographic features." IND. ADMIN. CODE tit. 50 r. 2.1-2-1(a).

201. 667 N.E.2d 810 (Ind. T.C. 1996).

provide other minor medical testing and assistance; an activities director plans on and off-site social functions, takes residents on errands, and arranges for clergy from the community to come in and conduct Sunday worship services; a variety of pay-for-use services are specially provided for residents who need assistance with tasks such as bathing, doing laundry, housekeeping, scheduling and attending doctor's visits, and running errands; and so forth. The Corporations argued that such charitable activities demonstrate that the Corporations are operated exclusively for charitable purposes, and thus relieve the Corporations of tax liability.

The IDSR, on the other hand, argued that although the Corporations provide services which are worthwhile and beneficial, the income they receive from the operation of those services is unrelated business income, and therefore taxable. In other words, the IDSR argued that the Corporations are not operating for a charitable purpose because the services they offer are no different than those offered by traditional apartment complexes.

The tax court, noting that for purposes of the Indiana gross income tax (and the other taxes at issue) there is no codified definition of "charitable," took its usual route of looking to the plain, ordinary, and usual meaning of charitable and how courts have construed the term.²⁰² The tax court cited to Indiana courts' historically broad construction of the term, "charity," for its conclusion that by meeting the needs of the elderly, namely relief of loneliness, boredom, decent housing that has safety and convenience and is adapted to their age, security, well-being, emotional stability, and attention to problems of health, the Corporations are operated exclusively for charitable purposes.²⁰³ The tax court found, therefore, that the Corporations are exempt from Indiana's gross income tax,²⁰⁴ gross retail tax,²⁰⁵ and food and beverage tax.²⁰⁶

Despite the tax court's findings, the IDSR continued to assert that the Corporations are subject to gross income tax on unrelated trade or business income as defined I.R.C. § 513.²⁰⁷ The tax court responded that § 513 concerns income received by an exempt organization that is not substantially related to the exercise of its charitable purpose or function constituting the basis for its exemption.²⁰⁸ The evidence presented at trial showed that the Corporations' gross income is, in fact, directly related to the charitable purposes for which they are organized and operating.²⁰⁹ Therefore, the tax court held that § 513 does not apply and the

202. *Id.* at 813 (citing IND. CODE § 1-1-4-1(1) (1993)).

203. *Id.* at 814.

204. *See* IND. CODE § 6-2.1-3-20(a) (1993).

205. *See id.* §§ 6-2.5-5-25, -26(b).

206. *See id.* §§ 6-9-12-4, 6-9-25-4(c).

207. "The exemptions provided by [IND. CODE §§ 6-2.1-3-19, 6-2.1-3-20, 6-2.1-3-21, and 6-2.1-3-22] of this chapter do not apply to gross income received by a taxpayer that is derived from an unrelated trade or business, as defined in Section 513 of the Internal Revenue Code." IND. CODE § 6-2.1-3-23 (1993).

208. *See* I.R.C. § 513 (1994).

209. *Raintree Friends Housing, Inc. v. Indiana Dep't of State Revenue*, 667 N.E.2d 810, 816

Housing Corporations are not subject to unrelated trade or business income tax pursuant to section 6-2.1-3-23 of the Indiana Code.²¹⁰

2. *National Ass'n of Miniature Enthusiasts v. State Board of Tax Commissioners*.²¹¹—The National Association of Miniature Enthusiasts (NAME) sought a charitable exemption for its real and personal property.²¹² The property NAME wanted to be exempt from taxation, all located in Hamilton County, Indiana, consists of a dwelling house and an outbuilding (and the land upon which these buildings sit), and personal property. The dwelling house contains a museum, library, and administrative offices. NAME is a not-for-profit organization and was granted a charitable exemption from federal income tax under § 501(c)(3). NAME's application for a charitable exemption from Indiana taxes was rejected in a final determination by the ISBTC. NAME appealed to the tax court and this opinion resulted from the ISBTC's motion for summary judgment.

NAME is a trade association for members of the general public who are interested in miniatures.²¹³ NAME's Articles of Incorporation declare that NAME is organized and operated exclusively for charitable and educational purposes. NAME's stated goals are to: (1) stimulate and enhance the interest and understanding of the general public in the construction and collection of miniatures as historical and creative art forms, (2) provide instruction and training to those members of the general public interested in miniature building and collections through publications, workshops, permanent and temporary exhibitions, programs, conferences and conventions, (3) recognize outstanding achievement in the creation and promotion of miniatures as an art form, (4) stimulate the exchange of information through the support of regional groups of persons interested in miniature building and collecting, and (5) develop a permanent collection and museum devoted to the art of miniature construction for the benefit of the general public. The activities of NAME include publishing the *Miniature Gazette*, a quarterly periodical; sponsoring a national houseparty and several regional houseparties each year; promoting local clubs; maintaining a permanent collection and museum at its headquarters; and conducting workshops on miniatures.

The first floor of the dwelling contains the museum and library. There is no charge for admission to the museum and library; however, they are open to the public only by making an appointment. Workshops on miniatures are also conducted on the first floor. The entire second floor functions as the national headquarters of NAME. NAME employs four persons to publish the *Miniature Gazette* and regional newsletters, plan and present houseparties, and support local clubs.

(Ind. T.C. 1996).

210. *Id.* at 816-17.

211. 671 N.E.2d 218 (Ind. T.C. 1996).

212. *See* IND. CODE § 6-1.1-10-16 (Supp. 1996).

213. Miniatures are miniaturized versions of everyday items, such as buildings, dolls, doll houses, furniture, etc., built to scale.

The tax court wasted no time in concluding that, although “[o]perating a museum for the public and enhancing the public’s knowledge about miniatures is a noble endeavor, such an endeavor does not relieve human want and suffering, two essential requirements for the charitable exemption in Indiana.”²¹⁴ The tax court also noted that by “declaring itself a charity in its Articles of Incorporation, NAME did not change its activities and endeavors into the sort the law recognizes as charitable and therefore entitled to tax exemption.”²¹⁵

NAME also claimed that its property qualifies for an exemption as having an educational purpose.²¹⁶ Indiana’s educational exemption is available to taxpayers who provide instruction and training equivalent to that provided by tax-supported institutions of higher learning and public schools because to the extent such offerings are utilized, the state is relieved of its financial obligation to furnish such instruction.²¹⁷ The tax court found that any educational training provided through NAME’s museum, library, workshops, local clubs, and houseparties are merely incidental to its recreational and hobby activities.²¹⁸

Therefore, the tax court denied NAME an exemption from property taxation as a charitable or educational organization.²¹⁹

214. *Miniature Enthusiasts*, 671 N.E.2d at 221 (citing *Indianapolis Elks Bldg. Corp. v. State Bd. of Tax Comm’rs*, 251 N.E.2d 673, 682-83 (Ind. App. 1969)).

215. *Id.* (citing *Indianapolis Elks*, 251 N.E.2d at 683).

216. IND. CODE § 6-1.1-10-16.

217. *Miniature Enthusiasts*, 671 N.E.2d at 222. *See also* *State Bd. of Tax Comm’rs v. Fort Wayne Sport Club, Inc.*, 258 N.E.2d 874 (Ind. App. 1970). In *Sport Club*, the court denied the exemption because “any educational benefits derived from [the soccer club’s and athletic club’s] operations [were] merely incidental” to the social and recreational activities that were the predominant uses to which the clubs were put. *Sport Club*, 258 N.E.2d at 882.

218. *Id.*

219. *Id.*

RECENT DEVELOPMENTS IN INDIANA TORT LAW

TAMMY J. MEYER*

DINA M. COX**

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INTRODUCTION

From October 1995 to October 1996, federal courts and state appellate courts of Indiana handed down a number of significant decisions in the area of tort law. These decisions have clarified existing rules of law, recognized new causes of action, and expanded the scope of existing tort law in Indiana.

I. NEGLIGENCE

A. *Defining the Scope of the Duty Owed*

Although no issue of first impression was addressed in *State v. Eaton*,¹ the court was confronted with an inventive and interesting argument concerning whether a motorcyclist had a duty to wear a helmet or protective eyewear when it may have been reasonably foreseeable that the motorcyclist’s vision might become impaired by dust and cause a collision. In *Eaton*, the plaintiff was a minor who was injured in a collision occurring on a state highway. A state highway crew had been working on the shoulder of a state highway “clipping” the shoulder. This involved pulling up dirt, gravel, and other materials along the edge of the road which created dust on the highway. Warning signs were posted in the area. However, the evidence conflicted on the amount of dust present and whether the accident occurred in the construction zone.²

Plaintiff was driving his motorcycle home from school on the highway and noticed dirt and dust present. As he came upon a slight rise in the road, he slowed. A semi truck was traveling in front of the plaintiff, and the plaintiff collided with the rear of the trailer.³ The plaintiff and his parents brought suit against the State of Indiana and the highway department.

The *Eaton* court was confronted with the issue of whether the failure to use a helmet and protective eye wear could be considered by the jury as contributory negligence. In concluding that it could not, the court recognized that there was no question that motorists have a duty to keep and maintain a proper lookout. That duty includes “the duty to see that which is clearly visible or which in the exercise of due care would be visible.”⁴ Because there was no authority to support the proposition that a motorcyclist had a duty to wear a helmet or protective eye wear, the court evaluated the question by employing the *Webb* balancing test.⁵ In this

1. 659 N.E.2d 232 (Ind. Ct. App. 1995), *trans. denied*.
2. *Id.* at 234.
3. *Id.*
4. *Id.* at 236.
5. *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991). Another decision employing the *Webb* balancing test is *Cram v. Howell*, 662 N.E.2d 678, 681 (Ind. Ct. App. 1996).

test, three factors are examined: “the relationship between the parties, 2) the reasonable foreseeability of harm, and 3) public policy concerns.”⁶ The court found that two of the factors militated against the finding of a duty. The court concluded that it was not foreseeable that plaintiff’s vision would be impaired by dust causing him to collide with a truck. “A motorist is not required to be constantly prepared for every conceivable circumstance”⁷ Secondly, the court found that public policy concerns suggested that a duty should not be imposed.⁸ The legislature had spoken; at the time of the accident, the statute which had required minors to wear a helmet and protective eye wear had been repealed.⁹ Because there was no duty to wear the equipment, the trial court did not commit error by excluding evidence on that issue. At present, minors riding motorcycles are required to use protective gear.¹⁰ The State’s proffer of evidence on this issue was a creative attempt to suggest a duty on the part of the plaintiff. It is similar to other attempts to interject evidence of a plaintiff’s failure to wear a seat belt.¹¹

One troubling aspect of the court’s analysis is its use of an abuse of discretion standard of review.¹² The question of the admissibility of this particular evidence was a question of law. If the plaintiff had a duty to wear the protective gear, the evidence would have been improperly excluded as a matter of law. The proper standard of review for a question of law is *de novo*.

The *Webb* balancing test was applied in another Indiana Court of Appeals case during the survey period that addressed an issue of first impression in Indiana. In *Campbell v. Eckman/Freeman & Associates*,¹³ the court considered whether “a private entity hired by an employer’s worker’s compensation carrier to provide rehabilitation services to the injured employee owes a duty of care to the injured employee.”¹⁴

The court applied the *Webb* balancing test and examined the relationship between the parties, the foreseeability of harm, and public policy considerations.¹⁵ On the issue of relationship, the court considered whether the relationship between the private entity hired by the worker’s compensation carrier to provide rehabilitation services and the injured employee could support the conclusion that the former owed a duty to the latter.¹⁶ The court noted that the rehabilitation coordinator hired by the insurance company was obligated to protect the interests of the injured employee, and the injured worker relied upon the professional skill

6. *Eaton*, 659 N.E.2d at 236.

7. *Id.* (quoting *Brock v. Walton*, 456 N.E.2d 1087, 1091 (Ind. Ct. App. 1993)).

8. *Id.*

9. *Id.*

10. *See* IND. CODE § 9-19-7-1 (1993).

11. *See id.* § 9-19-10-7.

12. *Eaton*, 659 N.E.2d at 236.

13. 670 N.E.2d 925 (Ind. Ct. App. 1996), *trans. denied*.

14. *Id.* at 931.

15. *Id.* at 933-35.

16. *Id.* at 933.

and judgment of the coordinator.¹⁷ However, the court recognized that the insurance carrier instructs the rehabilitation company concerning its services.¹⁸ Further, the rehabilitation coordinator did not provide any medical care or treatment to the injured employee but was merely assigned to monitor the employee's medical treatment.¹⁹ It was thus unclear whether the injured employee perceived that the coordinator was acting on his behalf or whether he was relying on the coordinator to comply with presurgical requisites.²⁰ Weighing all of the considerations, the court found that the rehabilitation coordinator did not have a relationship with the injured employee which would support a duty in negligence.²¹ Thus, the first factor in the *Webb* balancing test was not met.²²

The court then considered the second *Webb* factor of whether the injured employee was "a reasonably foreseeable victim injured by a reasonably foreseeable harm."²³ The court found that, although a rehabilitation company's failure to properly coordinate and communicate could create an unreasonable risk of harm to an injured employee, the court did not find such a causal connection in the case to give rise to a duty.²⁴ Thus, the second *Webb* factor was not met.²⁵

Finally, the court turned to public policy considerations and noted several competing issues. The court found that the rehabilitation coordinator was hired by the insurer with the goal of containing costs.²⁶ On the other hand, the injured worker could not be considered and treated as a party possessing equal bargaining power.²⁷ In any event, the court found that the balancing of these competing public policy issues should be reserved for the legislature.²⁸

In conclusion, in considering the relationship between the parties, the foreseeability of the harm, and public policy concerns, the court found that no duty should be recognized by the private entity hired by the worker's compensation carrier to the injured employee under the particular facts of the case.²⁹ As more employers and insurance companies attempt to minimize health care costs, it is conceivable that more injured employees dissatisfied with their care may look to the overseers hired by the employer or worker's compensation carrier for compensation when they believe they have been wronged. Because the *Campbell* court limited its holding to the facts of the case presented, the court left open the possibility that, in a proper case, a claim by the injured employee might be viable

17. *Id.*

18. *Id.*

19. *See id.* at 933-34.

20. *See id.* at 934.

21. *Id.*

22. *See id.*

23. *Id.*

24. *Id.* at 935.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

against the private entity hired by the worker's compensation carrier.

B. Proximate Cause—Superseding/Intervening Third Party Criminal Acts

*Pacific Employer's Insurance Co. v. Austgen's Electric, Inc.*³⁰ presented a question of first impression in Indiana: "whether there is a causal nexus between the negligent installation of a fire alarm system and fire damages resulting from arson."³¹ The court concluded that plaintiffs were not precluded from attempting to prove that there was a causal nexus between the negligent installation of a fire alarm system and the losses occasioned by third party criminal acts; the issues of proximate cause and foreseeability of the criminal acts were for the jury to decide.³²

In *Pacific Employer's*, plaintiffs were insurance companies who, as subrogees of their insureds, a school corporation, brought suit against Austgen, a company which installed a fire alarm system in the school. Plaintiffs brought a subrogation action for breach of contract, breach of implied and express warranty, products liability and negligence.³³

In 1985, the school entered into a written contract with Austgen for installation of a fire alarm system that included an automatic telephone dialer designed to engage when the fire alarm activated. The dialer was to call the emergency dispatcher at the police department and play a taped message concerning an active fire alarm at the school. In January 1988, Austgen was advised that the automatic dialer was not functioning properly. Austgen investigated and concluded that there was a problem with the school's dedicated phone line. Later, in early February 1988, the school notified Austgen that the dialer was still malfunctioning.³⁴

In the early morning hours of February 23, 1988, three young men broke into the school and set a fire in the Industrial Arts room. The fire then spread to other areas of the school. The automatic dialer did not engage, and the fire went undetected until a school employee arrived for work.³⁵ The trial court granted Austgen a judgment on the evidence.

The sole issue on appeal was whether there existed a causal connection between Austgen's negligent installation of the fire alarm system and the fire damages resulting from arson. The court reviewed Indiana's general rules concerning proximate cause and intervening cause:

In an action for negligence, an injury will be proximately caused by either a negligent act or the omission of a duty to act. The injury must be the natural and probable consequence, in light of the circumstances, that should have been reasonably foreseen or anticipated The

30. 661 N.E.2d 1227 (Ind. Ct. App. 1996), *trans. denied*.

31. *Id.* at 1229.

32. *Id.*

33. *Id.* at 1228.

34. *Id.*

35. *Id.*

requirement that the injury was foreseeable is directly related to the rule that an intervening cause may serve to sever the liability of one whose original acts sets in motion the chain of events leading to the injury. A superseding intervening cause sufficient to break the causal chain between wrongful conduct and injury must be one that is not "foreseeable" at the time of the wrongful conduct.³⁶

The court also acknowledged the general rule concerning third party criminal acts which may serve to break the chain of causation, i.e., when the wilful, malicious, and criminal acts of a third party take place between the alleged act of negligence and the injury and such could not reasonably have been foreseen by the allegedly negligent party, the causal chain between the negligence and the injury is broken.³⁷ The court noted that the issue of proximate cause, including the foreseeability of third party criminal acts, was a question for the trier of fact.³⁸

In analyzing whether arson was foreseeable and served to break the chain of causation, the court distinguished those cases relied upon by Austgen and the trial court involving the negligent installation of burglary systems. Those cases, which were not cited by the trial or appellate courts, held, as a matter of law, that the installer of a burglar alarm will not be liable despite negligent installation, when the acts of third party criminals intervene.³⁹ The court of appeals noted the intended difference between fire alarm systems and burglary systems: fire alarm systems are generally not installed to prevent fires but are instead designed to detect and warn in order to minimize damage, while burglary systems may be installed to not only warn, but to detect and prevent theft.⁴⁰ The court noted that the automatic dialer was crucial and, if operating properly, could have curtailed the time elapsed between the detection of a fire and the arrival of the fire department, thus limiting damages.⁴¹ Based upon that purpose, the court of

36. *Id.* at 1229 (citations omitted).

37. *Id.* at 1230.

38. "A duty to anticipate and to take steps to protect against a criminal act arises only when the facts of a particular case make it reasonably foreseeable that a criminal act is likely to occur." *Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383, 388 (Ind. Ct. App. 1986). The *Welch* court required a proprietor to have specific knowledge of the actor's behavior. *Id.* at 388-89. Recently, the *Welch* holding was reaffirmed in *Vernon v. Kroger Co.*, 654 N.E.2d 24, 28 (Ind. Ct. App. 1995). *Vernon* involved a man who was severely beaten by four unknown assailants in a Kroger parking lot. Because Kroger had no specific knowledge of the likelihood of Vernon's injury, it had no duty to protect against it. *See id.* at 28-29. The court refused to extend the common-law duty to a duty to foresee injury in an "abstract and generalized way." *Id.* at 29.

39. The trial and appellate court gave no citation to the authority relied upon by Austgen and the trial court other than a citation to Michael J. McMahon, Annotation, *Liability of Person Furnishing, Installing, or Servicing Burglary or Fire Alarm System for Burglary or Fire Loss*, 37 A.L.R. 4TH 47 (1983).

40. *Pacific Employer's*, 661 N.E.2d at 1230 n.2. The court did not discuss the fact that burglary alarms may also minimize damage by alerting the police.

41. *Id.* at 1230.

appeals held that it could not say, as a matter of law, that if the fire alarm system was functioning correctly, the school would not have suffered less damage.⁴² Pacific was therefore not precluded from attempting to show a causal nexus between the negligent installation of the fire alarm and the unmitigated damages caused losses by the criminal acts of third parties. Instead, the issues of proximate cause and foreseeability of the criminal acts were proper issues for the trier of fact.⁴³ The court further found that Pacific had presented sufficient evidence to support its claim so as to present the issue to the jury.⁴⁴

Pacific Employer's appears to open the door for further arguments that criminal acts of third parties may not constitute intervening causes. The court's distinction between the purpose of burglar alarms and fire alarms seems artificial. Is it not true that if a burglar alarm malfunctions, it is reasonably foreseeable that the police may not be alerted in time to find the burglary in progress so as to mitigate potential property loss? In the case of burglary and fire alarms, the crime or the fire is not likely reasonably foreseeable. However, it is arguably reasonably foreseeable that additional damage may occur if either are not functioning properly. Thus, depending on the facts of each case, the distinction between the two alarms could be irrelevant.

Pacific Employer's, in essence, changes the focus from whether the criminal acts are reasonably foreseeable to whether some of the damages resulting from the criminal acts are reasonably foreseeable. The focus has historically been whether the act itself is foreseeable, i.e., is it foreseeable that someone could be lurking in a dimly lit parking lot in a high crime area and attack a store patron? Is it foreseeable that a masked gunman would come through the front door of a department store at noontime and start shooting? If the focus is on whether the criminal act itself is reasonably foreseeable, whether or not certain resulting damages could be foreseeable should be irrelevant.

In *Pacific Employer's*, there was no evidence that it could have been foreseeable that an arsonist would break into the school and set fire. Therefore, as a matter of law, the intervening acts of the arsonists should have broken the chain of causation. Instead, the court focused on whether the resulting damages could be reasonably foreseeable. If such logic is expanded to other situations, one could argue that, even though it is not reasonably foreseeable that a crime could occur, it is reasonably foreseeable that additional damage could result should that crime occur. For example, a shopper is attacked in a well-lit parking lot not monitored by security guards, but that is the first such incident in the area. The attack is not reasonably foreseeable. However, under the logic of *Pacific Employer's*, it could be argued that it was reasonably foreseeable that the damages from the attack could have been mitigated had a security guard been present. Is the difference the fact that there was no need to have a security guard as opposed to a situation where it is recognized that there is such a need and the security guard then improperly performs his functions (i.e., like a malfunctioning alarm)? The

42. *Id.*

43. *Id.* at 1231.

44. *Id.*

Indiana Court of Appeals' decision in *Pacific Employer's* may have raised more questions than it answered.

II. COMPARATIVE FAULT

A. Fireman's Rule/Rescue Doctrine

In *Heck v. Robey*,⁴⁵ a paramedic injured while attempting to rescue a motor vehicle accident victim brought a negligence claim against the victim and his employer. The defendants moved for summary judgment, arguing that the fireman's rule barred the plaintiff's recovery. The trial court denied the motion, and the court of appeals accepted jurisdiction over the interlocutory appeal. The court of appeals reversed the trial court, holding that the fireman's rule applies to paramedics and barred the plaintiff's claim.⁴⁶ On petition to transfer, the Indiana Supreme Court disagreed and concluded that the fireman's rule did not, as a matter of law, bar the plaintiff's recovery. Furthermore, the Indiana Supreme Court held that, under the "rescue doctrine," the defendants owed a duty to the plaintiff to abstain from positive wrongful acts. Therefore, the trial court properly found that a genuine issue of material fact existed as to whether the defendant engaged in positive wrongful acts and thus did not err in rejecting the summary judgment motions.⁴⁷

In *Heck*, the Indiana Supreme Court examined the fireman's rule and the rescue doctrine after over a century of silence on the topic.⁴⁸ Historically, the Indiana Supreme Court recognized the rescue doctrine only in situations where one had endangered the safety of another through his or her negligence and was being subject to liability for injuries sustained by a third person in attempting to save another person from injury. Therefore, the *Heck* defendant argued that "the rescue doctrine applies only when there are three parties: a tortfeasor, a party injured as a result of the tortfeasor's negligence, and a rescuer of the party injured."⁴⁹ However, in examining the scope of duty under the rescue doctrine, the Indiana Supreme Court sided with the Supreme Court of Missouri in holding that "a person who injures himself while acting in a careless or reckless manner may owe a duty to his or her own rescuer" and that such duty "stems from an implied invitation to rescue."⁵⁰

[T]here is no logical basis for distinguishing between the situation in which recovery is sought against a defendant whose negligence imperiled some third party, and a situation in which recovery is sought against a defendant who negligently imperiled himself. A person with reasonable

45. 659 N.E.2d 498 (Ind. 1995).

46. *Heck v. Robey*, 630 N.E.2d 1361 (Ind. Ct. App. 1994), *vacated and rev'd*, 659 N.E.2d 498 (1995).

47. *See Heck*, 659 N.E.2d at 500.

48. *Id.* at 501.

49. *Id.*

50. *Id.* at 502 (citing *Lowrey v. Horvath*, 689 S.W.2d 625, 628 (Mo. 1985)).

foresight who negligently imperils another or who negligently imperils himself will normally contemplate the probability of an attempted rescue, in the course of which the rescuer may sustain injury. . . . [A] person who carelessly exposes himself to danger or who attempts to take his life in a place where others may be expected to be, does commit a wrongful act towards them in that it exposes them to a recognizable risk of injury.⁵¹

In *Heck*, the plaintiff responded to an accident in his capacity as a paramedic pursuant to a “911” emergency call. He conceded that his actions were not voluntary because he was acting under a duty imposed upon him as an employee.⁵² Ordinarily, this would suffice to defeat his argument that the defendants owed him a duty under the rescue doctrine. “[A] professional rescue attempt stemming from a ‘911’ call simply lacks the spontaneous and impulsive character that the rescue doctrine was designed to protect.”⁵³ Moreover, “only those who have a close proximity in time and distance to the party requiring assistance are within the class of potential rescuers.”⁵⁴ The court was not required to decide whether the injured rescuer must have had actual sensory perception of the injury or accident for a duty to arise under the rescue doctrine.⁵⁵ The Indiana Supreme Court held that the rescue doctrine “will not ordinarily create, for professional rescuers responding to emergency calls within the course of their employment, the same level of duty owed to lay rescuers present at or near the scene of an accident.”⁵⁶

Nonetheless, the plaintiff in *Heck* presented evidence that created a genuine issue of material fact as to whether the defendant engaged in flailing and kicking in a combative manner during the rescue attempt, making extrication more dangerous.⁵⁷ Thus, the duty arose not under the rescue doctrine, but from the relationship between the parties following the commencement of the rescue attempt.⁵⁸

In commenting on the fireman’s rule, the Indiana Supreme Court observed that public policy disfavors providing defendants with complete immunity based solely upon the plaintiff’s occupation.⁵⁹ The court also held that the fireman’s rule can no longer be based upon an assumption of the risk rationale because any rule that purports to effect an absolute defense based upon incurred risk is contrary to Indiana’s comparative fault scheme.⁶⁰

[W]e reject the Court of Appeals’ conclusion that because [the plaintiff] ‘implicitly agreed’ to the risks of working as a professional rescuer, he

51. *Id.* (quoting *Lowrey*, 689 S.W.2d at 628).

52. *Id.* at 504.

53. *Id.*

54. *Id.* at 502 (citing *Lambert v. Parrish*, 492 N.E.2d 289, 291 (Ind. 1986)).

55. *Id.* at 502-03.

56. *Id.* at 503.

57. *Id.*

58. *Id.*

59. *Id.* at 504.

60. *Id.* at 504-05.

was barred as a matter of law from recovering under the fireman's rule. While the fact-finder may determine that [the plaintiff] incurred risk, the fact-finder must consider any incurred risk as fault for apportionment purposes under the Act.⁶¹

"The question of whether there is continued viability for the fireman's rule limiting the duty of care owed by the owner of urban premises . . . is not directly presented in this case, and we decline to address it at this time."⁶² The court found further support for its position in the most recent amendment to the pattern jury instructions, "which is almost verbatim as the given instruction in this case."⁶³

B. Governmental Entities as Non-Parties

In *Shand Mining, Inc. v. Clay County Board of Commissioners*,⁶⁴ a plaintiff, who was involved in a single vehicle accident brought a personal injury action against the county and Shand Mining, the independent contractor with whom the county had its road maintenance agreement. In response to the complaint that the defendants breached their duty to maintain the road upon which the plaintiffs were injured, the county filed a cross-claim against Shand alleging that it was contractually obligated to maintain the road pursuant to a maintenance agreement.⁶⁵ Further, the county alleged that Shand had agreed to indemnify the county against any claims arising out of the use of the roadway. The county also contended that it was immune.⁶⁶

One of the questions facing the court of appeals was whether Shand had standing to challenge the trial court's finding of immunity. "The issue of standing focuses on whether the complaining party is the proper person to invoke the court's power. To have standing, a party must demonstrate a personal stake in the outcome of the lawsuit and must show, at a minimum, it was in immediate danger of sustaining some direct injury as a result of the conduct at issue."⁶⁷ In correctly concluding that Shand Mining had standing, the court noted that a dismissal of the county would have "preclude[d] the jury from assessing any fault against [the county]" and would have left Shand Mining in the position of being liable for the county's portion of fault.⁶⁸

61. *Id.* at 505.

62. *Id.*

63. *Id.* at 237 (citing INDIANA PATTERN JURY INSTRUCTIONS, CIVIL INSTRUCTION NO. 6.03 (Supp. 1994)).

64. 671 N.E.2d 477 (Ind. Ct. App. 1996), *trans. denied*.

65. *Id.* at 478.

66. See IND. CODE § 34-4-16.5-3 (Supp. 1996).

67. *Shand Mining*, 671 N.E.2d at 478 (citing *Shourek v. Stirling*, 621 N.E.2d 1107, 1109 (Ind. 1993)).

68. *Id.* at 480. The court also stated, "A dismissed party may not be a non-party for purposes of fault allocation." *Id.* at 479 (citing *Handrow v. Cox*, 575 N.E.2d 611, 613 n.1 (Ind. 1991)). This statement may be a little broad. A dismissal of a party for a failure to prosecute should not operate to preclude a co-defendant from naming that party as a non-party for purposes

Next, the court rejected the county's argument that it was entitled to summary judgment due to its governmental immunity.⁶⁹ The court reasoned that "[d]uties that are imposed by law or contract are considered non-delegable because they are deemed so important to the community that the principal should not be permitted to transfer these duties to another."⁷⁰ In Indiana, the legislature has specifically charged the county supervisor with the supervision of the maintenance and repair of all highways within the county.⁷¹ Further, Indiana judicial decisions have recognized that governmental entities have a specific obligation with respect to public travel.⁷² Although the county is free to delegate its responsibility for maintaining roads to a private entity, the court held that such a delegation does not relieve the county of liability.⁷³ The trial court, therefore, erred in granting summary judgment in favor of the county on the basis of governmental immunity.⁷⁴

Despite the rejection of the immunity argument, the Indiana Court of Appeals nonetheless affirmed the trial court because the plaintiffs failed to demonstrate that the independent contractor was negligent in its maintenance or repair of the road and that the county negligently failed to supervise such repair or maintenance.⁷⁵ The record was devoid of testimony, affidavits, depositions, or other proof establishing that Shand Mining negligently repaired or maintained the highway or that the county negligently supervised such maintenance.⁷⁶

Shand Mining was placed in an awkward position in this case—it was asked to argue its own negligence to prevent the appellate court's affirmation of the summary judgment in favor of the county.⁷⁷ Shand Mining was left in a position where it was unable to name the county as a non-party (because a dismissed party may not be a non-party for purposes of fault allocation),⁷⁸ yet the court found the duty to maintain the highway to be a non-delegable duty on the part of the county.⁷⁹

C. Comparative Fault as a Matter of Law

In *Thiele v. Norfolk & Western Railway Co.*,⁸⁰ the guardian of a motorist who was severely injured in a collision with a train at a railroad crossing where a

of fault allocation.

69. *Id.* at 481.

70. *Id.* (citing *Bagley v. Insight Communications Co.*, 658 N.E.2d 584, 586 (Ind. 1995)).

71. *See id.* (citing IND. CODE § 8-17-3-2 (1993)).

72. *See id.* (citing *City of Indianapolis v. Cauley*, 73 N.E. 691, 693-94 (Ind. 1905)).

73. *Id.*

74. *Id.*

75. *Id.* at 482.

76. *Id.*

77. *Id.* at 482 n.4.

78. *See id.* at 479 (citing *Handrow v. Cox*, 575 N.E.2d 611, 613 n.1 (Ind. 1991)).

79. A party should not be allowed to reduce liability for its negligence by arguing that a non-party negligently failed to supervise him.

80. 68 F.3d 179 (7th Cir. 1995).

federally funded crossing upgrade was being performed brought an action against the railroad. In affirming the trial court's grant of summary judgment to the railroad, the Seventh Circuit found that the Federal Railway Safety Act⁸¹ (FRSA) did not preempt state law adequacy of warnings claims until the warning devices were installed and fully operational.⁸² However, the court upheld the grant of summary judgment because it found that, as a matter of law, the Indiana Comparative Fault Act barred the plaintiff's recovery.⁸³ The court concluded that the evidence led to only one conclusion: that the plaintiff was more than fifty percent at fault for his injury. Consequently, under the Act, the plaintiff was precluded from recovery.

The court noted that "while the degree of comparative fault is normally a question of the fact finder, a court may apportion fault 'when there is no dispute in the evidence and the fact finder is able to come to only one logical conclusion.'"⁸⁴ The court held:

No reasonable jury could find otherwise than that [the plaintiff] was more than fifty percent responsible for his accident. [The plaintiff] was familiar with the crossing: He admits he knew it was there and that he had crossed it before. Uncontradicted eye witnesses testified that [the plaintiff] drove onto the tracks in daylight without stopping at the stop sign and then stopped once he was on the tracks. His failure to stop violated his statutory duty to stop and exercise due care before proceeding Furthermore, the train crew repeatedly sounded the whistle while [the plaintiff] stayed on the tracks. . . . [T]here is no genuine dispute that while [the plaintiff] was on the tracks, the approaching train was both clearly visible and audible. [The plaintiff's] car was found in the "park" gear position after the accident. No reasonable jury could find otherwise then that [the plaintiff] violated his duty to exercise reasonable care for his own safety and his statutory duty to stop, and that his negligence was more than fifty percent responsible for his injuries.⁸⁵

D. Intervening Cause Subsumed By Comparative Fault Act

In *L.K.I. Holdings, Inc. v. Tyner*,⁸⁶ the defendant contended that the trial court erred when it concluded that the question of whether the co-defendants' failure to yield was an intervening cause was not susceptible to summary judgment.⁸⁷ The

81. Pub. L. No. 91-458, §§ 201-212, 84 Stat. 971, 971-77 (1970) (codified as amended at scattered sections of 45 U.S.C.).

82. *Thiele*, 68 F.3d at 183.

83. *Id.* at 185.

84. *Id.* (citing *McKinney v. Public Serv. Co.*, 597 N.E.2d 1001, 1008 (Ind. Ct. App. 1992)).

85. *Id.* (citing IND. CODE § 9-21-4-16 (1993)).

86. 658 N.E.2d 111 (Ind. Ct. App. 1995).

87. *Id.* at 119.

trial court ruled that the issue of whether the collision was a foreseeable result of the moving defendant's allegedly negligent use of its property was a question for the jury.

The Indiana Court of Appeals noted that the effect of Indiana's Comparative Fault Act on the doctrine of intervening cause was an issue of first impression in Indiana.⁸⁸ According to the court, an intervening cause is one which comes into active operation in producing a result after the negligence of the defendant.⁸⁹ "Intervening cause, therefore, acknowledges a defendant's negligence, yet absolves the defendant of liability when the negligence is deemed remote. The adoption of comparative negligence, with its apportionment of fault, *renders the protection of a remote actor unnecessary.*"⁹⁰

Cases in which, prior to the adoption of comparative negligence, plaintiff might have lost under proximate cause rules, because the act of plaintiff or third parties was regarded as a "supervening cause," might be reconsidered because the court can now reach a fair decision by apportioning some of the blame to the defendant and some to third parties or to the plaintiff himself.⁹¹

The court therefore held that if the co-defendant's negligence was a proximate cause of the accident, such would not immunize the moving defendant from liability for damages proximately caused by its negligence.⁹² Rather, the co-defendant's negligent conduct triggers the apportionment principles of comparative fault, and the foreseeability of her negligence is simply a matter for the fact finder to consider in allocating fault.⁹³ The Indiana Court of Appeals found that the trial court properly reserved this issue for the jury because "the comparison of fault inherent in the doctrine of intervening cause has been incorporated into our comparative fault system."⁹⁴

L.K.I. Holdings serves to clarify the effect of Indiana's Comparative Fault Act on the defense of intervening cause. At the same time, however, the decision potentially renders a commonly used "defense" less potent.

E. Comparative Fault Jury Instruction

In *Utley v. Healy*,⁹⁵ the court examined the verdict forms in a case arising under the Comparative Fault Act. At trial, the jury was instructed in part, "[I]f you

88. *Id.*

89. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 44 (5th ed. 1984 & Supp. 1988)).

90. *Id.* (emphasis added).

91. *Id.* at 119-20 (citing *Michalak v. County of LaSalle*, 459 N.E.2d 1131 (Ill. App. Ct. 1984)).

92. *Id.* at 120.

93. *Id.*

94. *Id.*

95. 663 N.E.2d 229 (Ind. Ct. App. 1996), *trans. denied*.

find the Defendant is not at fault or that the Plaintiffs have failed to meet their burden of proof, then your verdict should be for the defendant, you should sign Verdict Form C, and no further deliberation of the Jury is necessary.”⁹⁶ The jury was given three verdict forms, including Verdict Form C, which simply stated: “We, the Jury, find for the defendant.”⁹⁷ The plaintiffs argued that, by giving the instruction and using Verdict Form C, the trial court violated the then current section 34-4-33-5 of the Indiana Code which provided:

In an action based on fault that is brought against one (1) defendant or two (2) or more defendants who may be treated as a single party, and that is tried to a jury the court . . . shall instruct the jury to determine its verdict in the following manner: (1) the jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a non-party.⁹⁸

This section requires the allocation of fault to the claimant, defendant, and any non-party. In addition, the statute includes specific rules about verdict forms.⁹⁹ The plaintiffs claimed that the statutes were violated because the jury was not required to first allocate the percentages of fault. They additionally contended that giving the instruction was equivalent to authorizing the jury to treat the collision as a “mere accident,” which is impermissible.¹⁰⁰ The court noted that it had already addressed this issue in *Evans v. Schenk Cattle Co.*¹⁰¹

In *Evans*, the court upheld the trial court’s action in giving a verdict form to the jury which required the jury to first determine whether the defendant was negligent before allocating fault. In upholding the use of the verdict form, the court stated, “If the jury finds no fault on the defendant’s part, there is no need to address allocation of fault.”¹⁰² The plaintiffs maintained that *Evans* was wrongly decided because it disregarded the plain language of the statutes involved. The Indiana Court of Appeals disagreed, finding the rationale in *Evans* to be persuasive and applicable to the present case. “It is a ‘time wasting effort’ for the jury to first determine that [the defendant] was 0% at fault, apportion the remainder of the percentages between the [non-party] and the [claimant] and then conclude that [the defendant] was not negligent.”¹⁰³ “This action is merely an exercise in futility since ultimately the jury found [the defendant] not negligent.”¹⁰⁴ “Once the jury concluded that [the defendant] was not negligent, there was no

96. *Id.* at 233.

97. *Id.*

98. *Id.* (citing IND. CODE § 34-4-33-5(a) (1993)). This section has recently been amended. However, the amendment became effective July 1, 1995 and was not relevant to the court of appeals review of the instant case.

99. *See* IND. CODE § 34-4-33-6 (1993).

100. *Utley*, 663 N.E.2d at 234.

101. 558 N.E.2d 892 (Ind. Ct. App. 1990).

102. *Utley*, 663 N.E.2d at 234 (citing *Evans*, 558 N.E.2d at 896).

103. *Id.*

104. *Id.*

reasonable purpose for the jury to engage in a further allocation of fault.”¹⁰⁵

III. PREMISES LIABILITY

Premises liability law in Indiana experienced no significant changes during the survey period. However, three cases in the area of premises liability were handed down by the Indiana Court of Appeals which are worthy of discussion. The first addressed the status of an entrant upon land and recognized, for the first time in Indiana, a license implied by custom. The second case of importance, although not deciding any issues of first impression in the state, addressed the comparative fault of the landowner and invitee and the defense of incurred risk. Finally, the court of appeals issued an opinion discussing artificial conditions on land—an issue which has received little attention in recent years by Indiana courts.

A. *Status of Entrant—Licence Implied by Custom*

In *Frye v. Trustees of the Rumbletown Free Methodist Church*,¹⁰⁶ the Indiana Court of Appeals not only discussed and clarified Indiana law on the status of entrants onto premises, but it also, in a case of first impression in Indiana, recognized a license implied by custom.

In *Frye*, the plaintiff experienced difficulties with his car when it stopped running near a church and its parsonage. The plaintiff left his car and approached the parsonage because it was the home nearest the place where his car stopped. The plaintiff’s intent was to use a phone or borrow a gas can. Because the plaintiff could not find anyone outside to ask for assistance, he walked up the concrete steps of the parsonage and knocked on the door. No one answered. As he descended the steps, the top step moved causing him to fall and become injured. The plaintiff sued the church for negligence.¹⁰⁷

The court faced the issue of the plaintiff’s status upon the land and the attendant duty of care owed to him by the church. The court quickly concluded that he was not an invitee because the church was not held “open to the public for every type of need.”¹⁰⁸ It is only “open to the public for church-related matters.”¹⁰⁹ The court then evaluated whether the plaintiff was a trespasser or a licensee. In concluding that he was a licensee, the court found that he had a privilege implied by custom to enter church property to seek aid.¹¹⁰ The court found that in the absence of an expression of possessor’s unwillingness to allow entry, a person is entitled to assume a privilege to enter another’s land to seek assistance.¹¹¹ The court then remanded the case for a trial on the issues of whether the steps were a

105. *Id.*

106. 657 N.E.2d 745 (Ind. Ct. App. 1995).

107. *Id.* at 747.

108. *Id.* at 749.

109. *Id.*

110. *Id.* at 750 (citing RESTATEMENT (SECOND) OF TORTS § 330 cmt. e, h (1977)).

111. *Id.*

latent or hidden danger and the extent of the church's knowledge of the danger.¹¹²

B. Comparative Fault of Landowner and Invitee—Incurred Risk

The court in *Ooms v. USX Corp.*,¹¹³ addressed the issues of restricted invitation, comparative fault of landowners and invitees, and the defense of incurred risk in premises liability cases. Although none of the issues were ones of first impression, *Ooms* contains a thorough discussion and provides clarification of the issues.

In *Ooms*, USX owned a steel mill where it maintained a bulk oil storage facility that received and stored fuel oil delivered to the site by tank truck. Ooms was employed by a trucking company that delivered bulk oil to USX. Ooms drove his truck to one of the unloading bays and hooked up the tanker. The ground was sloped and full of ruts. Oil spills were common, and oil was on the ground everywhere. The drivers were provided with an absorbent and instructed to throw it on the ground if oil spilled. While unloading, drivers were required to watch their trucks to ensure that hoses did not break and leak oil. The drivers were permitted to stand on a nearby hill to avoid standing in the oil. Drivers had complained many times about the conditions. Ooms' employer had told him that if he refused to deliver oil he would be fired. On the day of the incident, Ooms was standing on the hill while fueling because it was the only place to avoid standing in the oil. While stepping back down the hill, he slipped and fell. The next morning, USX leveled the hill, in part, because it was considered a tripping hazard.

The parties did not dispute that, under Indiana law, USX had a duty to keep the property in a reasonably safe condition. However, USX argued that Ooms had accepted a "restricted invitation" to enter its premises and, under that limited duty, there was no evidence of any breach.¹¹⁴ The court, although acknowledging that a "restricted invitation" can limit an invitee's duty, found that the evidence did not show that Ooms expressly agreed to a limited invitation to enter USX's premises.¹¹⁵ The court noted that "simply being aware of a condition does not translate into a restricted invitation or a corresponding limited duty."¹¹⁶

Finding that no restricted invitation or duty existed, the court's next inquiry was whether USX fulfilled its duty to Ooms to exercise reasonable care. The court cited section 343A of the Restatement (Second) of Torts: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the

112. *Id.*

113. 661 N.E.2d 1250 (Ind. Ct. App. 1996), *trans. denied*.

114. *See* *Hoosier Cardinal Corp. v. Brizius*, 199 N.E.2d 481, 487 (Ind. App. 1964) (holding that the inviter's duty depends upon "the circumstances surrounding the invitation, including the character of the premises, the nature of the invitation, the conditions under which it is extended, and the use of the premises to be made by the invitee.").

115. *Ooms*, 661 N.E.2d at 1252.

116. *Id.* at 1253.

possessor should anticipate the harm despite such knowledge or obviousness.”¹¹⁷ The court stated that the comparative knowledge of the landowner and invitee is not a factor in determining whether the duty exists, but it is a factor in determining whether the duty was breached.¹¹⁸ For guidance on the issue of comparative knowledge, the court referred to the comments to section 343A that can be summarized as:

- If the invitee knows the conditions and dangers, he is free to make a decision as to whether or not to incur the risk; and,
- an inviter can and should anticipate that in some cases a dangerous condition will cause harm to the invitee notwithstanding its known or obvious danger, and the inviter is not relieved of his duty.¹¹⁹

The court concluded that conflicting inferences rendered summary judgment improper.¹²⁰ Although Ooms was aware of the oily conditions, there was no safe place to stand; the only place for him to escape the oil was on the hill. Ooms did not take any unforeseeable or unauthorized actions. For these reasons, it would be reasonable to infer that USX should have anticipated that Ooms could not avoid the oil and the hill despite his knowledge of the condition.¹²¹

Finally, the court noted that it could not say that Ooms incurred the risk as a matter of law because there was no evidence that Ooms had actual knowledge and an appreciation of the specific risk involved in slipping while going down the hill; rather, the evidence merely showed he was aware of the oily conditions.¹²² Moreover, the court emphasized that there were conflicting inferences as to the voluntary nature of Ooms’ actions because Ooms had been told he would be fired if he refused to deliver to USX.¹²³ Thus, a jury could conclude that acceptance of the risk was involuntary.¹²⁴

Ooms did not address any issue of first impression in Indiana. However, it did narrow the application of the rules of law regarding restricted invitations, comparative fault of an invitee, and incurred risk in premises liability cases and is instructive on those issues.

C. Artificial Conditions on the Land

Although not a case of first impression in Indiana, the Indiana Court of Appeals in *Spears v. Blackwell*¹²⁵ discussed the issue of artificial versus natural

117. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 343A (1965)).

118. *Id.* (citing *Douglas v. Irvin*, 549 N.E.2d 368, 370 (Ind. 1990)).

119. *Id.* at 1254.

120. *Id.*

121. *Id.* at 1255.

122. *Id.*

123. *Id.*

124. *Id.*

125. 666 N.E.2d 974 (Ind. Ct. App. 1996), *trans. denied*.

conditions on land—an issue which has received little attention in recent years by Indiana courts.

In *Spears*, the plaintiff was driving his car on a rural road when another car driven by Brier pulled out in front of him. Brier was leaving defendant's residence. At the end of the driveway, there was an elevated area of land close to the road with tall weeds growing upon it. Brier and plaintiff could not see each other's cars for the weeds. Brier pulled out in front of the plaintiff, and the cars collided. Plaintiff brought suit against the landowner who, in turn, moved for summary judgment, which was granted.¹²⁶

After noting that an owner does not owe a duty to passersby on the road to protect them from natural conditions, the court reaffirmed that the law imposes a duty on the landowner if there is an artificial condition on the land about which the landowner knew or should have known.¹²⁷

The *Spears* court found that summary judgment was improper because the question whether the vegetation was a natural or artificial condition was a disputed issue of fact.¹²⁸ Although weeds can be a natural condition, vegetation planted by humans is not. It is the human activity which makes the difference. However, the court noted that the passage of time may transform an artificial condition into a natural condition.¹²⁹

Although not expressing any novel issues, *Spears* provides some guidance on natural versus artificial conditions of land and the duties owed by landowners.

IV. LIABILITY OF INDEPENDENT CONTRACTORS

The rules governing liability of independent contractors did not change during the survey period. However, a couple of cases were decided which help clarify this sometimes confusing area of law.

*Keith v. Van Hoy, Inc.*¹³⁰ helped clarify an exception to the general rule that the owner's acceptance of the independent contractor's work relieves the latter from liability to third parties. In *Keith*, the plaintiff's employer, Foamcraft, contracted with the defendant, Van Hoy, for Van Hoy to rewire Foamcraft's foam crusher. Prior to the rewiring, foam could only be inserted through one end and, if it needed to be crushed further, it was removed and then reinserted through the same end; that end had a guard, but the "exit end" did not. After the rewiring, foam could be inserted from either end; however, an additional guard for the "exit end" was neither requested nor added. Foamcraft accepted Van Hoy's work, and Van Hoy never received any complaints. A year and a half later, plaintiff was injured while feeding foam through the end of the crusher which lacked a guard.¹³¹

In *Keith*, the court began its analysis by stating the general rule that "once an

126. *Id.* at 976.

127. *Id.* at 977.

128. *Id.*

129. *Id.*

130. 656 N.E.2d 872 (Ind. Ct. App. 1995), *trans. denied*.

131. *Id.* at 872-73.

employer accepts an independent contractor's work, the contractor is not liable for injuries to third persons."¹³² However, an independent contractor remains liable to third persons "where personal injury is caused by work which was left in a condition that was dangerously defective, inherently dangerous, or imminently dangerous such that it created a risk of imminent personal injury."¹³³ The court also noted the policy reason of the no duty rule: "[O]ne who lacks possession and control of property, . . . should not be held liable for injuries he is no longer in a position to prevent."¹³⁴

In finding that Van Hoy was not liable to Keith, the court analogized *Keith* to a case where an independent contractor installed a pool with various design discrepancies. Because the equipment was in the sole control of the managers of the pool for two years after the installation and acceptance, the court found no duty.¹³⁵ In *Keith*, the injury occurred one and a half years after the acceptance. The wiring was done properly, and Van Hoy was not asked to install safety guards. Moreover, as in *Snider*, the independent contractor had done what the hiring party had directed.¹³⁶

The court distinguished this case from *National Steel Erection v. Hinkle*¹³⁷ where a roofer had negligently installed roofing material. Later, the plaintiff, who had gone to repair a leak, fell through the roof and sustained serious injuries. The *Keith* court noted that the roof was left in an inherently dangerous condition (i.e., the materials were too thin) whereas there was nothing wrong with the wiring itself in the crusher at issue.¹³⁸ This distinction is a bit contrived. If the rewiring left the machine inherently dangerous, i.e., it left the machine with a "business" end that had no guard, then why should it matter that the rewiring was done properly?

However, the court's holding is clearly correct. Its analysis properly focused on the length of time between the acceptance and the injury. It also properly focused on whether the contractor had carried out the instructions of the hiring party. There are other factors which could have supported the court's decision. First, the roof in *National Steel* was a latent defect of which the hiring party probably had no notice. Second, in *National Steel*, the roofer used substandard material which was almost certainly contrary to the hiring party's expectations. Third, the roofer presumably had superior knowledge of roofing materials, and the hiring party was likely to rely on that superior knowledge. In *Keith*, the hiring party requested and received a rewired crusher. The hiring party had sole control of the crusher for one and a half years. If the crusher needed another guard, the hiring party should have known that fact. The duty to install the guard was therefore with the hiring party, not the independent contractor. Simply stated,

132. *Id.* at 873.

133. *Id.* (quoting *Snider v. Bob Heinlin Concrete Const. Co.*, 506 N.E.2d 77, 81 (Ind. Ct. App. 1987) (internal quotation marks omitted).

134. *Id.* at 874 (quoting *Snider*, 506 N.E.2d at 82).

135. *Id.* (citing *Snider*, 506 N.E.2d at 82).

136. *Id.*

137. 541 N.E.2d 288 (Ind. Ct. App. 1989).

138. *Keith*, 656 N.E.2d at 874.

where the contract or does that which he is requested to do and *his work* (i.e., the rewiring vs. the placement of a guard, or the construction of the pool vs. the design of a pool) is not what is inherently dangerous, the acceptance of the work relieves the contractor of liability to third parties subsequently injured.

The court of appeals briefly revisited this issue in *Hill v. Rieth-Riley Construction Co.*¹³⁹ where the plaintiff was injured when her vehicle struck a guardrail on a highway. The state had reconstructed the roadway and had hired Rieth to do the reconstruction. Rieth subcontracted with Hoosier to remove and reset the guardrail. The guardrail had been installed using a "buried end treatment" and was reinstalled by Hoosier in the same manner. The state accepted the work and released Rieth and Hoosier from further maintenance. Plaintiff claimed that the guardrail was dangerous when struck from the end. Rieth and Hoosier countered that their work had been accepted by the state thereby relieving them from liability. Plaintiff responded claiming that the exception to that rule applied because the work was left in a dangerous and defective condition. The issue became whether the guardrail when struck in one specific manner, which may cause a vehicle to vault on its side, is sufficiently dangerous to fall into the exception.¹⁴⁰

The court of appeals in *Hill* further clarified what is meant by "inherently dangerous." "The term 'inherently dangerous' is more properly applied to activities or instrumentalities which are *by their nature, always dangerous*, i.e. blasting or wild animals."¹⁴¹ The *Hill* court noted that the guardrail was a safety device and dangerous only when struck at the very end at a shallow angle.¹⁴² Vehicles hitting the guardrail in areas other than where plaintiff hit would be saved. Thus, the guardrail is not always dangerous.¹⁴³ The court held that the "exception is meant to be used only for continuously dangerous activities and instrumentalities," which the guardrail was not.¹⁴⁴

In addressing an independent contractor's liability, or lack thereof, to third parties, both of these cases served to limit the exception to the general rule and further bolster the defense of independent contractors to actions brought by third parties.

V. DRAM SHOP LIABILITY

The Indiana Court of Appeals addressed one case involving dram shop liability during the survey period and refused to expand liability beyond the

139. 670 N.E.2d 940 (Ind. Ct. App. 1996).

140. *Id.* at 942-44.

141. *Id.* at 945 (quoting *National Steel Erection v. Hinkle*, 541 N.E.2d 288, 292 (Ind. Ct. App. 1989)).

142. *Id.*

143. *Id.*

144. *Id.*

confines of Indiana's dram shop liability statute.¹⁴⁵ In *Weida v. Dowden*,¹⁴⁶ the court addressed the knowledge requirement and what constitutes "furnishing" alcohol under the dram shop statute. The court also addressed, and rejected, attempts to expand liability beyond the statute for injuries resulting from providing alcoholic beverages, particularly to minors.

In *Weida*, Michelle Weida and her parents brought suit against the Dowdens and others after Michelle was injured in an automobile accident in which she was a passenger. The driver, Firth, was a minor who became intoxicated after drinking free, self-served beer from a keg at a wedding reception he and Michelle attended. The reception was hosted by the parents of the young woman the Dowdens' son was marrying. Suit was also brought against the country club where the reception was held, the club house manager, the liquor permit applicant, and the Dowdens.¹⁴⁷

The bride was employed by the country club; so she held her reception there without charge and without a written contract. Her parents organized the reception; however, her fiancé's mother paid the a deposit on a keg of beer for the reception at her fiancé's request. The groom's parents, the Dowdens, did not invite any guests or provide any decorations. The groom and a friend picked up the keg and delivered it to the country club. During the reception, the plaintiff, Michelle, noticed Firth drinking beer from the unattended keg. Firth did not appear intoxicated. At one time during the reception, Firth drank three to four beers in a forty-five minute period. The club manager also did not observe any underage drinking.¹⁴⁸

During the reception, Firth and Michelle began arguing and later left together. While Firth was driving Michelle home, he crossed the center line and struck an oncoming vehicle injuring Michelle. His blood alcohol level was .12%.¹⁴⁹

Plaintiffs brought suit against the defendants alleging that the free, self-serve beer had been provided by the Dowdens and consumed on premises owned and operated by the country club. Plaintiffs claimed that the negligent conduct of the defendants proximately caused Michelle's injuries.¹⁵⁰ The defendants filed motions for summary judgment. The trial court initially denied the motions finding that a material issue of fact existed; i.e., whether the person furnishing the alcohol had actual knowledge that the person to whom the alcohol was furnished was visibly intoxicated at the time it was furnished.¹⁵¹ After the court denied the motions for summary judgment, the parties entered into and filed a stipulation that the person furnishing the alcoholic beverages to Firth did not have actual knowledge that Firth was visibly intoxicated at the time the alcohol was

145. IND. CODE § 7.1-5-10-15.5 (Supp. 1996).

146. 664 N.E.2d 742 (Ind. Ct. App. 1996), *trans. granted*, (Ind. Oct. 31, 1996).

147. *Id.* at 745.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

furnished.¹⁵² After the stipulation was filed, the court granted summary judgment in favor of the defendants. Plaintiffs then appealed.¹⁵³

The court of appeals first addressed the liability of the club, club manager, and the holder of the liquor license. The court restated Indiana law interpreting the dram shop statute, holding that the statute does not limit its application to adults but includes minors.¹⁵⁴ Because the statute limits liability to those who have actual knowledge that the person to whom alcohol is furnished is visibly intoxicated, and the parties stipulated that the person furnishing the alcohol to Firth had no such knowledge, liability could not attach.¹⁵⁵

The court went on to note, in dicta, that liability would not extend to the club in any event because it could not be shown that the club "furnished" alcohol to Firth. Again, the court reaffirmed Indiana law that to be held liable as one who supplies or "furnishes" the alcohol, that person must be the "active means" by and through which the liquor is placed into the custody of the intoxicated person.¹⁵⁶ The court noted that the club did not purchase the beer but that it was brought to the club by the groom. The court addressed this issue presumably to further clarify and restate Indiana law because the stipulation was conclusive as to the inapplicability of the Dram Shop Act.¹⁵⁷

The court of appeals then addressed whether common law theories of negligence were viable. Despite the Dram Shop Act, the court noted that common law negligence claims could be pursued by plaintiffs.¹⁵⁸ However, based on the facts presented in *Weida*, the court rejected plaintiffs' common law claims. The court found that the club owed Firth no duty because there was no special relationship between the two parties; White did not assume responsibility to check identification or dispense or serve the beer. The mere fact that the reception was held at the club was insufficient to impose a duty on the club.¹⁵⁹

The Dowden's potential common law liability reached a similar fate. The court found that the Dowdens did not furnish, possess, dispense, control, or supervise the beer; they merely furnished the money which purchased the beer. The court concluded that there was no special relationship between Firth and the Dowdens. The court refused, as it had on prior occasions, to extend liability to the pure social host for common law liquor liability; instead, the Dram Shop Act controlled.¹⁶⁰ The court noted that it was not reasonably foreseeable to the Dowdens that their contributing money for the keg would result in Firth becoming intoxicated and involved in an automobile accident.¹⁶¹

152. *Id.* at 746.

153. *Id.* at 747.

154. *Id.* at 748.

155. *Id.*

156. *Id.* at 749.

157. *Id.*

158. *Id.* at 750.

159. *Id.* at 751.

160. *Id.* at 753.

161. *Id.*

Weida not only restated Indiana law on dram shop liability but, as Indiana has done in the past, refused to expand liability beyond the confines of the statute.

VI. PARENTS'/GRANDPARENTS' LIABILITY FOR ACTS OF CHILD

In *Wells v. Hickman*,¹⁶² in a case of first impression, the court recognized a parent's failure to control a minor child as a viable cause of action.¹⁶³ The court evaluated this cause of action in light of an Indiana statute which limits a parent's liability for the knowing, intentional or reckless actions of a minor child.¹⁶⁴

In *Wells*, a fifteen-year-old killed a twelve-year-old, and the twelve-year-old's mother sued the killer's parents and grandparents on a variety of negligence theories. The court first concluded that the statutory provision did not preclude a common law action against the parents for *their* negligence.¹⁶⁵ The statutory provision merely holds parents strictly liable up to \$3000 for certain tortious acts committed by their child.¹⁶⁶

In evaluating the common law negligence claims, the court found that there are four exceptions to the general rule that a parent is not liable for the tortious acts of the child.¹⁶⁷ Because this liability is grounded in negligence, a duty to control will only exist in "those circumstances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm."¹⁶⁸ The court also held that a duty only attaches where "the parent must know or should have known that the child had a habit of engaging in the particular conduct which led to the plaintiff's injury."¹⁶⁹ Because neither the parents nor the grandparents knew or should have known "that the child has engaged in a particular act or course of conduct and it is reasonably foreseeable that this conduct would lead to the plaintiff's injuries," the court held, as a matter of law, that there was no duty in this case.¹⁷⁰

162. 657 N.E.2d 172 (Ind. Ct. App. 1995).

163. *Id.* at 177.

164. IND. CODE § 34-4-31-1 (1993).

165. *Wells*, 657 N.E.2d at 177.

166. *See id.* at 176-77.

167. *Id.* at 176. The exceptions are: 1) where the parent entrusts a child an instrumentality that, because of the child's lack of experience, may pose a danger to others, 2) where the child is acting as a servant or agent for the parents and commits a tort, 3) where the parent "consents, directs or sanctions" the tort, and 4) where the parent fails to exercise control over the child, if the parent knows or should have known that injury to another is foreseeable. *See id.* (quoting *K.C. v. A.P.*, 577 So. 2d 669, 671 (Fla. Dist. Ct. App. 1991)).

168. *Id.* at 178 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991)).

169. *Id.* (citing *Parsons v. Smithey*, 504 P.2d 1272, 1276 (Ariz. 1973); *K.C.*, 577 So. 2d at 671).

170. *Id.* at 179. The court also rejected a theory of negligent entrustment and premises liability. *Id.* at 179-80.

VII. GOVERNMENTAL LIABILITIES & IMMUNITIES

A. *Discretionary Functions and Immunity*

Within a month's time during the survey period, the Indiana Court of Appeals decided two cases dealing with the scope of a governmental entity's discretionary function immunity under the Indiana Tort Claims Act.¹⁷¹

In the first of these decisions, the court concluded that the City of Indianapolis was immune from liability. In *L.K.I. Holdings, Inc. v. Tyner*,¹⁷² Tunney was driving northbound on Brokenhurst Road in Indianapolis. The road intersected with Fall Creek. L.K.I. constructed and maintained one section of the road in connection with its development of a residential neighborhood. On the date of the incident, that part of the road was a preferential street to Brokenhurst Road, which had not been accepted by the City of Indianapolis as a right of way or as part of the public street system. As Tunney passed through Fall Creek, she collided with Dickson who has been traveling in the other direction on Fall Creek. There were no traffic control signs at the intersection, and a dirt mound constructed by L.K.I. obstructed the view of the vehicles. L.K.I. and the City of Indianapolis were both named as defendants in complaints filed by Tunney and passengers in her car. L.K.I. moved for summary judgment which was denied. However, the court granted the city's motion for summary judgment. L.K.I. and Tunney's passenger maintained that the trial court erred when it granted summary judgment to the City of Indianapolis. The trial court had determined that the city had no statutory duty to erect a sign on L.K.I.'s property.¹⁷³

The court of appeals concluded that the city was immune from liability. The court reviewed relevant Indiana cases which established that a governmental entity is not liable if the loss results from the performance of a discretionary function.¹⁷⁴ In deciding whether an act is discretionary, Indiana utilizes the planning-operational test.¹⁷⁵ Under that test, governmental entities are not held liable for alleged negligence arising from decisions which are made at a planning rather than an operational level. Such planning activities include "acts or omissions undertaken by an entity in the exercise of a legislative, judicial, executive, or planning function that involves formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing public policy."¹⁷⁶

The court refused to accept L.K.I. and the passenger's argument that, by never considering whether to place a traffic control device at the intersection, the city never engaged in a conscious policy-oriented analysis required for immunity from liability. The court noted that "this characterization of the issue [is] overly

171. IND. CODE § 34-4-16.5-3(6) (Supp. 1996).

172. 658 N.E.2d 111 (Ind. Ct. App. 1995), *trans. denied*.

173. *Id.* at 120.

174. *Id.*

175. *See id.*

176. *Id.* (citing *Peavler v. Monroe Bd. of Comm'rs*, 528 N.E.2d 40 (Ind. 1988)).

narrow.”¹⁷⁷ The court found that an executive order issued by the Mayor of Indianapolis was sufficient to invoke the planning activities which then necessitates a finding that discretionary acts were performed and the city was immune from liability.¹⁷⁸ The executive order attempted to address the absence of traffic control devices in city subdivisions and additions to the city where the streets had not been accepted by the Department of Transportation. The order required that the traffic engineer of the city submit recommendations to the transportation board regarding the installation of traffic control devices in those subdivisions or additions when certain conditions were met. The court found that “the city’s considered decision to entrust placement of traffic control devices to a traffic engineer is not reviewable under tort standards.”¹⁷⁹ However, if the traffic engineer incorrectly performed the pre-determined procedures, then his or her decisions would be reviewable.¹⁸⁰

The court noted that, at the time of the collision, the road did not meet the qualifications of the executive order and therefore did not require the traffic engineer to submit a report.¹⁸¹ There was no allegation that the traffic engineer negligently implemented the executive order. Rather, L.K.I. and the passenger argued that the city’s failure to engage in a decision-making process concerning the intersection necessitated a finding that the city was not immune from liability. The court noted that such an argument ignored the executive order which was issued in response to the problem of lack of traffic control devices in subdivisions and additions that were not fully complete.¹⁸² The order prioritized new subdivisions so that additions with higher traffic flow and the greatest need for the installation of traffic control devices would be examined first. Because the court found that the mayor engaged in a policy-oriented decision-making process when he executed the Order,¹⁸³ it refused to second guess the mayor’s judgment and held that the city was immune.¹⁸⁴

An opposite result was reached in *Town of Highland v. Zerkel*.¹⁸⁵ In *Zerkel*, the plaintiff tripped and fell over an elevated portion of a cracked sidewalk while walking her dog. The plaintiff had lived in the neighborhood for thirty-three years and frequently walked the sidewalks. She alleged that the city was negligent in failing to keep its sidewalks in a reasonably safe condition for pedestrian travel. The city denied any negligence and raised several affirmative defenses, one of which was immunity under the Indiana Tort Claims Act. The city filed a motion for summary judgment asserting that it was entitled to discretionary function immunity. The court denied the motion. A jury trial was held, and a verdict for

177. *Id.*

178. *Id.* at 121.

179. *Id.*

180. *See id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. 659 N.E.2d 1113 (Ind. Ct. App. 1995), *trans. denied*.

the plaintiff was entered. The city appealed, and the court of appeals affirmed the trial court's decision to deny the city's motion for summary judgment.¹⁸⁶

The court noted that the city had an informal sidewalk replacement program in effect at the time of the plaintiff's accident. The Director of Public Works had testified regarding the program, which allowed concerned citizens, if they chose, to contact the city with their concern about a particular sidewalk. If the city found upon inspection that the sidewalk was in need of repair, it would remove the defective sidewalk and the homeowner would be responsible to pay for replacement of the sidewalk. The court concluded that the program did not amount to a policy-oriented decision-making process.¹⁸⁷

Although there was no need for the city to demonstrate that it considered and rejected specific improvements, there was no evidence that the city implemented its program by way of a policy decision.¹⁸⁸ There was no ordinance on the subject or any formal writings putting residents on notice that it was their responsibility to alert the city to potential problems. The record was completely devoid of the elements necessary to create discretionary immunity, i.e., board deliberation, professional judgment, weighing of budgetary considerations, or risk assessment. Rather, any action with regard to the repair of sidewalks was incumbent solely upon residents. The city did not inspect the sidewalks or decide which sidewalks needed repair. If the city received a complaint, it would send the homeowner an application for the sidewalk replacement program. The court concluded that the city had "failed to demonstrate that it engaged in any type of systematic process for determining which sidewalks were in need of repair or that it implemented a policy weighing budgetary considerations to replace defective sidewalks."¹⁸⁹ Thus, the court found that the trial court correctly determined that the city was not entitled to discretionary function immunity.¹⁹⁰

B. Statutory Cap

In *State v. Eaton*,¹⁹¹ the court of appeals addressed the issue of whether a single statutory cap applying to governmental entities required the application of a single statutory cap to separate jury verdicts, one of which awarded the parents damages for loss of their child's services and the other of which awarded the child damages for personal injuries, when both damage awards together exceed the single statutory cap.

In *Eaton*, a minor was injured in a collision occurring on a state highway. His parents, acting as guardians, sued the State on his behalf and also sued on their own behalf for loss of services. The jury returned a verdict in the plaintiffs' favor. The jury awarded the parents, as legal guardians for the minor's personal injuries,

186. *Id.* at 1116, 1119.

187. *Id.* at 1119.

188. *See id.*

189. *Id.*

190. *Id.*

191. 659 N.E.2d 232 (Ind. Ct. App. 1995), *trans. denied*.

\$449,280 and awarded the parents, in their individual capacity, \$101,178 for loss of the minor's services. The trial court reduced the larger award to \$300,000 in accordance with the Indiana Tort Claims Act, but allowed the loss of services award to stand. The State appealed.¹⁹²

The State argued that the trial court erred in refusing to apply a single statutory cap of \$300,000 to the jury verdicts.¹⁹³ The Indiana Tort Claims Act provides as follows:

The combined aggregate liability of all governmental entities and of all public employees acting within the scope of their employment and not excluded from liability under section 3 of this chapter, does not exceed three hundred thousand dollars (\$300,000) for injury to or death of one (1) person in any one (1) occurrence and does not exceed five million dollars (\$5,000,000) for injury to or death of all persons in that occurrence. A governmental entity is not liable for punitive damages.¹⁹⁴

The State argued that the plaintiffs' claim for loss of services was derivative and, therefore, one statutory cap should be applied.¹⁹⁵

The court of appeals noted that Indiana had never addressed the question of whether a single statutory cap is applicable to a derivative claim, the Seventh Circuit had addressed this precise issue, ruling that a single statutory cap was not applicable.¹⁹⁶ The Indiana Court of Appeals found that, even though the plaintiffs' claim for loss of services was derivative in the sense that they could not have prevailed if the jury had decided against the minor, the derivative nature of their claim was not dispositive of whether they were entitled to separate damages under the Tort Claims Act.¹⁹⁷ The court noted that "the wrongful act by which a minor child is injured gives rise to two causes of action: one in favor of the child for personal injuries, and the other in favor of a parent for loss of services."¹⁹⁸ The court concluded that a parents' claim for loss of services, although derivative, is a separate injury within the meaning of the Tort Claims Act and gives rise to a separate right of recovery.¹⁹⁹ The court of appeals found that "the trial court properly declined to apply a single statutory cap to the jury's award of damages."²⁰⁰

192. *Id.* at 234.

193. *Id.* at 236.

194. *Id.* (quoting IND. CODE § 34-4-16.5-4 (1993)).

195. *Id.* at 237.

196. *Id.* (citing *Myers v. Lake County*, 30 F.3d 847 (7th Cir. 1994)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

VIII. THE RECOGNITION OF A NEW TORT:
INTENTIONAL INTERFERENCE WITH INHERITANCE

In *Minton v. Sackett*,²⁰¹ the plaintiff instituted an action alleging the defendant interfered with her expectancy under an individual's will by the use of fraud, duress, undue influence, and coercion and that the defendant was unjustly enriched by his actions. The defendant filed a Trial Rule 12(B)(6) motion to dismiss on the basis that "intentional interference with an inheritance" is not a recognized cause of action in Indiana.²⁰² The trial court granted the defendant's motion, and the plaintiff appealed contending that the trial court erred in failing to conclude that Indiana recognizes such a tort. The Indiana Court of Appeals noted that the plaintiff's appeal presented an issue of first impression in Indiana. Thus, the court looked to decisions of other jurisdictions for guidance.

"Several states have chosen to extend the concept of wrongful interference with a business advantage to the noncommercial context of interference with an inheritance," adopting the approach of the Restatement (Second) of Torts.²⁰³ The Restatement provides that "one who by fraud or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to others for the loss of the inheritance or gift."²⁰⁴

In determining whether to adopt this approach, the court determined that it must "balance the competing goals of providing a remedy to injured parties and honoring the strictures of our probate code, which provides that a will contest is the exclusive means of challenging the validity of a will."²⁰⁵ The majority of the states which have adopted the tort of interference with an inheritance have achieved this balance by "prohibiting a tort action to be brought where the remedy of a will contest is available and would provide the injured party with adequate relief."²⁰⁶ The *Menton* court adopted this method.²⁰⁷

Although the plaintiff contended that her tort action should be permitted to proceed because the remedies available to her through the will contest were inadequate, the court concluded that the remedies available under the will contest adequately provided the plaintiff with the damages sought in her complaint. The will contest provided an opportunity for the plaintiff to receive both consequential damages and compensatory damages in the amount of one-half of the value of the estate.²⁰⁸ "[T]he adequacy of a remedy is not dependent upon whether a will

201. 671 N.E.2d 160 (Ind. Ct. App. 1996).

202. *Id.* at 161.

203. *Id.* at 162.

204. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 774B (1979)).

205. *Id.* (citing IND. CODE § 29-1-7-17 (1993); *In re Estate of Niemiec*, 435 N.E.2d 999 (Ind. Ct. App. 1982)).

206. *Id.* (citing *DeWitt v. Duce*, 408 So. 2d 1216 (Fla. 1981); *In re Estate of Hoover*, 515 N.E.2d 991 (Ill. App. Ct. 1987); *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978)).

207. *Id.* at 163.

208. *Id.*

contestant prevails, but upon whether the contestant has an opportunity to pursue the remedy.”²⁰⁹ The court refused to permit the plaintiff a “second bite at the apple” by allowing her to seek the same type of damages in a tort action that she was also attempting to recover in a will contest action filed just six days before her complaint for intentional interference with an inheritance.²¹⁰ In defining the new tort, the court concluded that “a plaintiff can only expect to receive the amount he or she would have received had it not been for another individual’s interference.”²¹¹ Therefore, punitive damages are not recoverable.²¹²

IX. EXPANDING A DOG OWNER’S POTENTIAL LIABILITY: NEGLIGENT ENTRUSTMENT OF THE FAMILY PET

In *Hardsaw v. Courtney*,²¹³ the defendants appealed a jury verdict for the plaintiffs where the defendants were found to have negligently entrusted their premises, including a dog, to their twelve-year-old daughter. The defendants contended that the evidence was insufficient to support the jury verdict and judgment.

To prove a claim for negligent entrustment, the court noted that “a plaintiff must prove: (1) an entrustment; (2) to an incapacitated person or one who is incapable of using due care; (3) with actual and specific knowledge that the person is incapacitated or incapable of using due care at the time of the entrustment; (4) proximate cause; and, (5) damages.”²¹⁴ Furthermore, the court noted, that although application of the doctrine entrustment was once limited to situations involving automobiles and firearms, it no longer depends solely upon the instrumentality involved.²¹⁵ The theory does not hinge on the nature of the instrumentality, but focuses instead on the “supplying of the instrumentality for probable negligent use.”²¹⁶

Regarding the first element of the claim, the Indiana Court of Appeals concluded that the plaintiffs established an entrustment of the dog to the defendants’ minor child.²¹⁷ The child was left home alone with the dog chained on the premises. The child recognized that she was responsible for the dog’s well being: she immediately went to the dog’s aid upon learning that it was tangled in its chain. Furthermore, the court noted “a domestic pet is not a wholly self-sufficient animal and requires human care and supervision under many circumstances It was reasonably foreseeable that [the minor] would have to

209. *Id.*

210. *Id.*

211. *Id.*

212. *See id.*

213. 665 N.E.2d 603 (Ind. Ct. App. 1996).

214. *Id.* at 606 (citing *Brewster v. Rankins*, 600 N.E.2d 154, 158-59 (Ind. Ct. App. 1992)).

215. *Id.*

216. *Id.*

217. *Id.*

exercise some form of care or control of the dog during the course of the day.”²¹⁸

Next, the court found that the evidence supported the second element of the cause of action: the defendants’ daughter was incapable of using due care in supervising and controlling the dog.²¹⁹ There was no evidence that the child was instructed by her parents on how to care and control the dog. The defendants admitted that the child had a complete lack of prior experience in supervising the dog. Additionally, there was testimony that the dog and the child were approximately the same physical size. Therefore, the court of appeals found sufficient evidence to support the jury’s conclusion that the defendants’ daughter was incapable of exercising due care in her custody and control of the dog.²²⁰

Finally, the court found sufficient evidence from which the jury could have inferred that the defendants had actual and specific knowledge that their daughter was incapable of using due care at the time they entrusted her with the dog.²²¹ In recognition of her young age, the defendants gave their daughter specific instructions to stay in the house while they were gone and to telephone them if she had any problems. She had no prior experience in supervising the dog and, on the day in question, did not receive any instructions on how to care for or control the dog in the absence of her parents. This evidence, coupled with the fact that the dog and the child were similar in size, supported a reasonable inference that the defendants had actual knowledge that the child would be unable to control the dog adequately.²²²

Still, the defendants maintained that they had no reason to know that their dog represented a risk of harm to others and, thus, were not negligent in entrusting the dog to their daughter. The court reiterated the general rule that all dogs, regardless of breed or size, are presumed to be harmless domestic animals.²²³ Although this presumption is overcome only by evidence of a known dangerous propensity as shown by the specific acts of the animal,²²⁴ the owner of the dog is

bound to know the natural propensities of dogs, and if those propensities are of the kind which reasonably might be expected to cause injury, the owner must use reasonable care to prevent such injuries from occurring. Indeed, an owner is bound to know that a dog might become excited or confused under certain circumstances and must use reasonable care to prevent a mishap.²²⁵

218. *Id.* at 606-07.

219. *Id.* at 607.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (citing *Royer v. Pryor*, 427 N.E.2d 1112, 1117 (Ind. Ct. App. 1981)).

224. *Id.* A dangerous propensity is “a tendency of an animal to do any act which might endanger the safety of persons or property in a given situation.” *Id.* When the animal’s owner or keeper has knowledge of a dangerous propensity, he or she is obligated to use reasonable care to prevent the animal from causing injury. *See id.*

225. *Id.* (citing *Alfano v. Stutsman*, 471 N.E.2d 1143, 1145 (Ind. Ct. App. 1984)).

Even if the owner is unaware of any specific vicious propensity, the duty owed is the same—that of reasonable care under the circumstances:

Reasonable care requires that the care employed and precautions used be commensurate with the danger involved under the circumstances of a particular case. The necessary precautions to be observed or foresight to be exercised are usually questions to be resolved by the jury. Any given method of restraining a dog may or may not be adequate under the particular facts of a particular case.²²⁶

In the case at hand, there was no evidence that the dog had exhibited viciousness in the past. Nevertheless, the court concluded that, even absent a known vicious propensity, “a dog is an instrumentality which may become a source of danger to others when entrusted to a young child who lacks age, judgment, and experience. . . . Whether an owner’s entrustment of the control and restraint of a dog to a child was reasonable under the circumstances is a question for the jury.”²²⁷

Although restrained in the yard by a chain, [the defendants’ dog] was left under the care and supervision of a twelve-year-old child who had no previous experience supervising him. Before [the child] came to [the dog’s] aid to untangle him, [the dog] was in severe distress, yelping and foaming at the mouth. A child with no prior experience in supervising a dog is not likely to foresee or comprehend that a dog may become dangerous when in pain and distress. As a result of [the child’s] inability to use due care and to recognize that propensity, [the child] unchained the dog, failed to keep a firm grasp on him, and allowed the distressed animal to attack and severely injure [the plaintiff].

As we noted in *Ross*, chaining a dog and even confining it behind a fence is not, as a matter of law, necessarily sufficient. We emphasize here that [the defendants’ dog] was not restrained in any way at the time of the attack but had escaped the hands of a child. Under the facts and circumstances of this case, it was reasonable for the jury to conclude that [the defendants’] entrustment of [the dog] to [their child] was a failure to exercise reasonable care in the manner of keeping and controlling their dog.²²⁸

In her concurring opinion, Judge Chezem disagreed that the presumption that all dogs are harmless domestic animals could be overcome by the fact of an unprovoked biting at issue in a case.²²⁹ Likewise, Judge Chezem did not agree that, after making such a leap, the jury could then reasonably infer that the owner

226. *Id.* at 607 (citing *Ross v. Lowe*, 619 N.E.2d 911, 914-915 (Ind. 1993)).

227. *Id.*

228. *Id.* (citation omitted).

229. *Id.* at 609 (Chezem, J., concurring).

should have known of the previously undisclosed vicious propensity.²³⁰ In the case at bar, there was no evidence that the defendants' dog had ever committed any specific prior act which would have indicated that he had a dangerous propensity.²³¹ According to Judge Chezem, although it is foreseeable that a dog may become entangled in its chain, the owner of a dog who has never before displayed any aggressive tendencies should not necessarily be bound to know that such a dog would attack when freed from this type of predicament.²³²

Furthermore, Judge Chezem disagreed that the defendants were negligent in leaving their dog in the care of their twelve-year-old daughter.²³³ There was no evidence that she did not possess at least average intelligence and capabilities. Moreover, "even the most intelligent and capable adult would have responded by taking the same immediate measures when faced with what otherwise would result in the almost certain death of the family pet."²³⁴ According to Judge Chezem, releasing the dog was not unreasonable.²³⁵ "Perhaps, the negligence, if any, was in the original chaining of the dog to a tree without constant supervision."²³⁶ Nonetheless, without knowing what specific act the jury considered negligent, Judge Chezem indicated that deference should be given to the fact finder.²³⁷

At first glance, the *Hardsaw* opinion appears to significantly expand an animal owner's potential liability even where there is no evidence of prior viciousness or where the facts illustrate an attack stemming from a situation in which the animal is distressed. However, given the procedural posture of the case—an appeal from a jury verdict—the holding of the case can be said to be limited; the court was required to uphold the verdict upon finding any supportive evidence or reasonable inferences therefrom to support.

X. INVASION OF PRIVACY

Since the 1940s, Indiana has recognized the doctrine of the right of privacy as the basis of a cause of action.²³⁸ One theory of recovery under the doctrine of the right of privacy is the tort of public disclosure of private facts. In *Nobles v. Cartwright*,²³⁹ the Indiana Court of Appeals, for the first time, discussed in depth the "legitimate public interest" element of the public disclosure tort.

In *Nobles*, the plaintiff had a love affair with her boss, Crawford, then Indiana State Lottery Commission Director. The affair went sour, and the plaintiff

230. *Id.*

231. *Id.*

232. *Id.* at 610.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. See *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755 (Ind. 1946); *Continental Optical Co. v. Reed*, 86 N.E.2d 306 (Ind. App. 1949); *Datton v. Jacobs*, 78 N.E.2d 789 (Ind. App. 1948).

239. 659 N.E.2d 1064 (Ind. Ct. App. 1995).

complained to one of Governor Bayh's assistants and showed her some love letters Crawford had written to Cartwright. Eventually, Crawford was confronted with the allegations and resigned. Almost immediately, there was "widespread media attention" concerning the resignation and "speculation about what prompted it."²⁴⁰ The media focused on the plaintiff and began reporting that she and Crawford had an affair. A few days later, the Governor's office released a statement acknowledging only that Crawford had resigned because of the plaintiff's allegations.

As media attention continued, polls indicated that the public believed that plaintiff ought to have been fired. Accordingly, plaintiff granted an interview with the press and made several inflammatory statements concerning members of the Lottery Commission and the Indiana State Police. She was fired for this, and the Governor's office released copies of documents that the plaintiff had provided which contained intimate details of her personal life.

In evaluating whether the defendant's disclosure²⁴¹ constituted an invasion of privacy, the court considered whether the private facts disclosed were related to a matter of legitimate public interest.²⁴² The court found that the proper test is whether there is an appropriate nexus or some sufficient degree of relatedness between the information disclosed and a matter which was newsworthy at the time.²⁴³ In other words, it must be "substantially relevant and closely related to a matter or an event which was of legitimate public interest."²⁴⁴

In this case, the court found such a nexus. The details related not only to the charges leveled by the plaintiff, but also to the conduct of the Lottery Director and his fitness for office.²⁴⁵ The court concluded, "[N]o reasonable juror could determine that the information . . . disclosed by [the defendants] is not both substantially relevant and closely related to Crawford's alleged sexual harassment and the ensuing investigation into his resignation, which was, at the time of the disclosure, a matter of legitimate public interest."²⁴⁶

Cartwright is a significant decision because it discusses, in depth, for the first time in Indiana, the "legitimate public interest" element of the tort of public disclosure of private facts and the standard to be applied in determining what is of legitimate public interest.

240. *Id.* at 1067.

241. The tort of public disclosure of private facts consists of three elements: "(1) A public disclosure of private information concerning the plaintiff that would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (2) to persons who have no legitimate interest in the information; (3) in a manner that is coercive and oppressive." *Id.* at 1074 (footnotes omitted).

242. *Id.* at 1075.

243. *Id.* at 1076.

244. *Id.* at 1077 n.24.

245. *Id.* at 1077.

246. *Id.* at 1078.

XI. TORTIOUS INTERFERENCE WITH CONTRACT OR BUSINESS RELATIONSHIP

The Indiana Court of Appeals, in *Computers Unlimited, Inc. v. Midwest Data Systems, Inc.*,²⁴⁷ addressed whether competition is an improper interference with contractual relations. Liebhardt consolidated its business operations and hired Computers Unlimited to provide computer hardware and to integrate Liebhardt's software. Liebhardt experienced problems with the system from the beginning and blamed Computers Unlimited. Liebhardt contacted Alpha for a list of other hardware dealers and then contacted Midwest, who recommended GVS for the software work. Liebhardt met with Midwest and GVS and explained the problems. GVS presented to Liebhardt its standard terms and rates. Liebhardt decided to purchase a new hardware system from Midwest and hired GVS to provide software services. After the new system was installed and GVS was performing services, Liebhardt notified Computers Unlimited that their relationship was terminated.²⁴⁸

The court first concluded that there was no valid and enforceable contract, nor was there a business relationship at the time of the report.²⁴⁹ This precluded a finding of either a tortious interference with either a contract or a business relationship.²⁵⁰

The court also considered the claim that the offering of terms and rates and the performance of services during the pendency of the business relationship and contract constituted a tortious interference. As a starting point, the court noted that an element of that claim is the absence of justification.²⁵¹ The court also referred to section 768 of the Restatement (Second) of Torts which is entitled, "Competition as Proper or Improper Influences." The court found 1) that the relation between GVS and Liebhardt concerned a matter involved in the competition between GVS and Computers Unlimited; 2) that there was no unlawful restraint of trade, and 3) that GVS had not employed any wrongful means in its inference.²⁵² This result is clearly correct. In order to recover, Computers Unlimited had to demonstrate *tortious* interference, not just interference. It did not.

Computers Unlimited is a significant decision because it excludes from the tort of interference with contract or business relationships those cases where the alleged "interference" concerns a matter of competition and other improper means are not used to terminate a contract which is terminable at will. The decision, in effect, restricts the class of cases to which the torts of interference with contract or business relationships apply.

247. 657 N.E.2d 165 (Ind. Ct. App. 1995).

248. *Id.* at 168.

249. *Id.*

250. *See id.*

251. *Id.* at 169 (citing *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. Ct. App. 1994)).

252. *Id.* at 170.

XII. FRAUD

A. *Proof of Fraud Does Not, Alone, Support an Award of Punitive Damages*

In *Budget Car Sales v. Stott*,²⁵³ sixty-two-year-old Ralph Stott went to Budget Car Sales and looked at a 1986 Chevrolet Cavalier. The car bore no indication of its price. Unaware of an advertisement which appeared in a local newspaper indicating that the Cavalier was specially priced at \$4995, Mr. Stott made an offer of \$5800 for the car. The sales person with whom Mr. Stott dealt was also unaware of the advertisement. Mr. Stott signed several documents that he did not read until later. Mr. Stott did not realize that he had purchased the car until later that evening when he and his wife read the documents he signed. When he signed the documents, Mr. Stott claimed that he thought he was merely completing an application for a loan. Two days later, the Stotts' attorney wrote a letter to Budget stating that he believed Stott to be incompetent when entering into the contract and suggested that the contract was void. Budget declined to rescind the contract, stating that there was absolutely no evidence that Stott was not fully competent and aware of his acts at the time of contracting with Budget. After a trial, the jury returned a verdict for the plaintiffs and against Budget assessing \$4041.22 in compensatory damages and \$150,000 in punitive damages. Budget appealed the jury verdict challenging the award of punitive damages and charging plaintiffs' counsel with misconduct in referring to a document during closing that was not admitted into evidence.

The court reversed the jury's award of punitive damages.²⁵⁴ The court reiterated the evidentiary requirement for a punitive damages award that requires a "showing by clear and convincing evidence that the defendant 'acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing.'"²⁵⁵ A mere finding by preponderance of the evidence that a tort has been committed will not, standing alone, justify the imposition of punitive damages.²⁵⁶ The court concluded that there was no clear and convincing evidence that a reasonable person could say was inconsistent with the hypothesis of a mistake or negligence on the part of Budget for being unaware of the advertised price.²⁵⁷ A defendant against whom punitive damages are sought in a tort action is "cloaked with the presumption that his actions, though tortious, were nevertheless noniniquitous human failings."²⁵⁸ The court refused to find that the punitive damage award was justified by the mere finding that Budget acted

253. 656 N.E.2d 261 (Ind. Ct. App. 1995), *trans. denied*, 662 N.E.2d 638 (Ind. 1996).

254. *Id.*

255. *Id.* (quoting *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 520 (Ind. 1993)).

256. *Id.*

257. *Id.* at 266.

258. *Id.* (quoting *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986)).

with fraud.²⁵⁹

In a dissenting opinion, Judge Chezem opined that any finding of actual fraud supports the trier of fact's decision to award compensatory and punitive damages.²⁶⁰ To Judge Chezem, "fraud is a unique tort in terms of punitive damages because the requisites for use of the 'clear and convincing' standard must have been met in obtaining a judgment of fraud in the first place."²⁶¹ The presumption created by the "clear and convincing" standard is necessarily overcome in proving the underlying tort because one cannot commit actual fraud without the intent to injure another.²⁶² When the elements of actual fraud have been proved, the presumptions created by use of the "clear and convincing" standard have already been overcome.²⁶³ "When actual fraud has been proved, the trier of fact is free to, but is not required, to impose punitive damages without further evidentiary burden."²⁶⁴

In another dissenting opinion, Judge Sullivan disagreed with the majority's affirmation of the compensatory damage award. According to Judge Sullivan, there was no reliance on the part of the Stotts because they did not even know about the newspaper advertisement offering the car at a price less than \$5800 until days after the sale had been fully consummated.²⁶⁵ Judge Sullivan would find, as a matter of law, that there was no representation made by Budget upon which Stott justifiably and detrimentally relied.²⁶⁶ Judge Sullivan also stated his disagreement with the position taken in Judge Chezem's dissent. According to Judge Sullivan, "not every fraud resulting in justified and detrimental reliance is infected with the degree of malice or oppressiveness necessary for punitive damages."²⁶⁷ Furthermore, the burden to establish entitlement to punitive damages is more onerous than the burden to prove compensable fraud.²⁶⁸ One must prove the right to punitive damages by clear and convincing evidence.²⁶⁹ According to Judge Sullivan, Judge Chezem mistakenly assumed that a "clear and convincing" burden exists to prove common law fraud.²⁷⁰

The Indiana Court of Appeals revisited the issue of whether proof of fraud automatically entitles a plaintiff to punitive damages in *Hart v. Steel Products, Inc.*²⁷¹ There, the parties contracted for the purchase of a steel manufacturing business in Windfall, Indiana. After finding that the sellers committed fraud with

259. *Id.* at 267.

260. *Id.* at 269 (Chezem, J., concurring in result and dissenting).

261. *Id.*

262. *See id.*

263. *See id.* at 269-70.

264. *Id.* at 271.

265. *Id.* at 272 (Sullivan, J., concurring in part and dissenting).

266. *Id.*

267. *Id.* (citing *Hickman*, 622 N.E.2d at 515).

268. *See id.* (citing *Seibert v. Mock*, 510 N.E.2d 1373 (Ind. Ct. App. 1987)).

269. *See id.* (citing *Hickman*, 622 N.E.2d at 520).

270. *Id.*

271. 666 N.E.2d 1270 (Ind. Ct. App. 1996), *trans. denied*.

respect to the business' income during a particular year, the purchasers sought reformation of the contract. After a bench trial, the trial court entered findings of fact and conclusions of law and judgment in favor of the purchasers. In addition, the contract for the sale of the business assets was ordered rescinded. The sellers contended on appeal that there was insufficient evidence to prove that they had committed fraud. In turn, the purchasers also challenged the trial court's failure to award punitive damages.

The court found that there was sufficient evidence to demonstrate that the purchaser had reasonably relied upon the financial information submitted to him in making his offer to purchase the business.²⁷² In addition, the court found that punitive damages are appropriate "only where it is proved by clear and convincing evidence that a party acted with malice, fraud, gross negligence or oppressiveness which was not the result of mistake of fact or law, honest error of judgment, overzealousness, mere negligence or other human failing."²⁷³ Furthermore, the court held:

Upon a finding of civil fraud, it is within the discretion of the fact finder to award punitive damages. *An award of punitive damages is not mandatory upon a finding of civil fraud.* The purpose of punitive damages is to punish the wrongdoer and thereby deter others from engaging in similar conduct. The public interest must be served by the imposition of punitive damages.²⁷⁴

B. Broken Promises of Future Conduct May Constitute Constructive Fraud

Indiana has long recognized the general rule that actionable fraud arises from false representations of past or existing facts and cannot be based on broken promises or statements of existing intent which are not executed. However, *Farrington v. Allsop*²⁷⁵ illustrates that constructive fraud may sometimes be based upon mere oral promises.

Farrington involved a suit on a promissory note barred by the statute of limitations. The Farringtons had lent Allsop \$30,000 for a real estate deal. Allsop had promised to repay the debt quickly, but he did not. When the corporation that Allsop owned filed for bankruptcy, the Farringtons visited Allsop at this office to seek repayment. Allsop produced a promissory note evidencing the original loan. The note named Allsop's corporation rather than Allsop as the maker. Allsop, however, told the Farringtons that they need not worry because Allsop felt morally obligated to repay the loan. The loan was never repaid, despite Allsop's continuing representations that he would repay it, and the Farringtons brought suit after the statute of limitations had expired.

The court found that genuine issues of material fact precluded summary

272. *Id.* at 1274-75.

273. *Id.* at 1277 (citing *Budget Car Sales v. Stott*, 662 N.E.2d 638 (Ind. 1996)).

274. *Id.* (emphasis added).

275. 670 N.E.2d 106, 109 (Ind. Ct. App. 1996).

judgment for Allsop based on the expiration of the limitations period.²⁷⁶ In arriving at its conclusion, the court distinguished actual fraud which requires, *inter alia*, a material misrepresentation of existing material fact and constructive fraud which does not.²⁷⁷ Constructive fraud alone may be a basis for an equitable estoppel.²⁷⁸ However, the court made it clear that the doctrine's "application is limited."²⁷⁹ The party asserting an equitable estoppel must prove a fiduciary relationship or some unequal footing in the transaction or "conduct of a character to lead [him] to inaction."²⁸⁰

C. An Attorney's Silence Regarding Changes Made to Documents May Constitute Fraud

The Indiana Court Appeals announced during this survey period that an attorney may subject him or herself to an action for fraud where he or she remains silent in the face of a duty to speak. In *Wright v. Pennamped*,²⁸¹ a borrower brought an action against his lender's attorney who drafted the loan documents asserting claims under theories of quasi-contract, actual fraud, and constructive fraud. The borrower alleged that, after his attorney had approved the loan documents, the drafting attorney altered them then failed to disclose the alterations at the closing attended only by the borrower without his attorney.

In evaluating the fraud claim, the court noted that "absent a duty to speak or disclose facts," there can be no fraud.²⁸² However, in this case, the court found a duty to disclose on the part of the attorney.²⁸³ The court stated that this "duty is supported by common sense and notions of fair dealing."²⁸⁴ Otherwise, "counsel would be required to scrutinize every term of each document at the moment of execution."²⁸⁵ Additionally, the court noted that attorneys are held to a demanding standard and that "[a] lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness."²⁸⁶

The court also rejected the contention that the plaintiff had no right to rely on the attorney's representation. "A person relying upon the representations of another is found to exercise ordinary care and diligence against fraud."²⁸⁷

276. *Id.* at 110 (The court refused to limit the application of the doctrine to settlement negotiations.). *Id.* at 109.

277. *Id.* at 109. *See also* *Abbott v. Bates*, 670 N.E.2d 916, 923 n.4 (Ind. Ct. App. 1996) (comparing constructive fraud with actual fraud).

278. *See id.* at 110.

279. *Id.*

280. *Id.* (quoting *Paramo v. Edwards*, 563 N.E.2d 595, 599 (Ind. 1970)).

281. 657 N.E.2d 1223 (Ind. Ct. App. 1995).

282. *Id.* at 1231.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* (quoting *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 312 (Ind. 1994)).

287. *Id.*

However, courts will not “ignore an intentional fraud practiced on the unwary.”²⁸⁸ The court concluded that the borrower exercised reasonable care by having his attorney review the loan documents in the first place and that the borrower had a right to rely on the alleged representation made by the lender’s attorney as a matter of law.²⁸⁹

Lastly, the court concluded that there was a genuine issue of material fact concerning the attorney’s scienter. Intent may be proven by circumstances and is generally for the fact-finder.²⁹⁰ The court also reinstated the constructive fraud claim. The absence of a special relationship between the borrower and the lender’s attorney was not controlling. “In Indiana, constructive fraud also includes what other jurisdictions have termed ‘legal fraud’ or ‘fraud in law’. . . . *This species of constructive fraud recognizes that certain conduct should be prohibited because it is inherently likely to create an injustice.*”²⁹¹ This is so even in the absence of an intent to deceive. The material alteration of loan documents after their review and approval by opposing counsel and the presentation of the revised documents for execution with no indication that changes that have been made is just that sort of conduct.

XIII. PROFESSIONAL NEGLIGENCE

In *Hughes v. Glaese*,²⁹² the Indiana Supreme Court clarified the doctrine of fraudulent concealment and tolling of the statute of limitations. In *Hughes*, the plaintiff was examined by the defendant doctor for some abdominal repair surgery. A routine chest x-ray was ordered which revealed a rounded density; the radiologist recommended a lateral x-ray as a follow-up. The doctor performed the surgery and then released the plaintiff to her family physician stating that she was “ok.” Three years later, she was diagnosed with Hodgkin’s Disease. In addressing whether the statute of limitations was equitably tolled, the court considered the effect of the doctrines of active fraudulent concealment and constructive fraudulent concealment. Active fraudulent concealment tolls the statute of limitations “until actual or reasonably possible discovery of malpractice”;²⁹³ constructive concealment tolls the statute of limitations until the “termination of the physician-patient relationship.”²⁹⁴ The court then refused to abolish the distinction between the two.²⁹⁵ It noted the difference in culpability and that

288. *Id.* (quoting *Plymale v. Upright*, 419 N.E.2d 756, 762 (Ind. Ct. App. 1981)).

289. *Id.*

290. *See id.* at 1232. “Because no one badge of fraud constitutes a per se showing of fraudulent intent the facts must be taken together to determine how many badges of fraud exist and if together they constitute a pattern of fraudulent intent.” *Id.* (quoting *Jones v. Central Nat’l Bank*, 547 N.E.2d 887, 890 (Ind. Ct. App. 1989)).

291. *Id.* at 1233 (quoting *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 323-24 (Ind. Ct. App. 1991)).

292. 659 N.E.2d 516 (Ind. 1995).

293. *Id.* at 521.

294. *Id.*

295. *Id.*

distinctions based upon the likelihood of particular misrepresentations to lead plaintiffs astray are not a just way of determining which physicians should be precluded from asserting the limitations defense.²⁹⁶ The court then found that by merely stating that the plaintiff was "ok" and releasing her to her family physician, no reasonable fact-finder could conclude that the defendant actively concealed the plaintiff's condition.²⁹⁷ Therefore, the action was time barred.²⁹⁸

XIV. OTHER DECISIONS

A. *Member's Lawsuits Against Unincorporated Associations*

In *MacDonald v. Maxwell*,²⁹⁹ the plaintiff, a member of the Chapel Hill United Methodist Church, brought a negligence action against the church and the janitor of the church after she slipped and fell on the church's floor. The janitor filed a motion for summary judgment arguing that he did not owe a duty to the plaintiff and, in the alternative, that he did not breach any duty owed. The trial court granted the motion, and the plaintiff appealed.³⁰⁰

The Indiana Court of Appeals noted the general common-law rule in Indiana that prohibits members of an unincorporated association from suing the association for the tortious acts of one or more of its members.³⁰¹ Because the plaintiff was a member of the church, and the church was an unincorporated association, she was barred from suing the church. Thus, her sole remedy was to sue the non-member janitor, who, because of the general rule, was "left without the usual employee protections of respondeat superior or joint and several liability".³⁰²

The rule protecting an unincorporated association from a suit by its own members was originally adopted in an attempt to prevent collusive lawsuits between the members of an association.³⁰³ However, the court found it "hard to believe" that the rule was also intended to allow a part-time employee of an association to shoulder the sole responsibility for a member's accident.³⁰⁴ The court wrote:

Because we find it hard to accept that a non-member employee of an

296. *Id.*

297. *Id.* at 522.

298. The court did not evaluate the constitutionality of the occurrence-based statute of limitations. *See Harris v. Raymond*, 680 N.E.2d 551, 552-53 (Ind. Ct. App. 1997) (occurrence-based statute violated Indiana Constitution); *Martin v. Richey*, 674 N.E.2d 1015, 1027 (Ind. Ct. App. 1997) (same). *But see Johnson v. Gupta*, No. 64A03-9611-CV-401, 1997 WL 403702 (Ind. Ct. App. July 21, 1997) (disagreeing with *Martin*).

299. 655 N.E.2d 1249 (Ind. Ct. App. 1995).

300. *Id.* at 1250.

301. *Id.* at 1250 n.1 (citing *Calvary Baptist Church v. Joseph*, 522 N.E.2d 371, 374 (Ind. 1988)).

302. *Id.*

303. *See id.*

304. *Id.*

unincorporated association should be exposed to such liability or that an injured plaintiff could only look to the pockets of a non-member employee, *we believe that it may be time to take another look at the rule and particularly the rule's impact on the employees of an unincorporated association and injured plaintiffs*. . . . However, because this issue was not raised in this appeal, we must leave its determination for another day.³⁰⁵

Despite the harshness of the rule, the court found that the janitor had a duty to use reasonable care in waxing the church's floor. Because the question whether the defendant breached this duty presented a question of fact, the trial court's entry of summary judgment in favor of the defendant was reversed.³⁰⁶

B. Release of Servant Releases Master

In *United Farm Bureau Mutual Insurance Co. v. Blossom Chevrolet*,³⁰⁷ the Indiana Court of Appeals held that the release of a servant releases the master where the master's liability is vicariously imposed. The court reasoned that, in the case of vicarious liability, only one tortfeasor caused the injury, and the master and servant should be treated as a single unit for the purpose of distributing the loss.³⁰⁸ The court noted that "the reason for the employer's liability is that the damages are taken from a deep pocket."³⁰⁹ "And, once the servant has been discharged from liability, there is no negligence which can be imputed to the master."³¹⁰ The court reached this conclusion even though prior case law suggested that releasing one joint tortfeasor does not release all joint tortfeasors, by distinguishing between joint tortfeasors and vicariously imposed liability.³¹¹

305. *Id.* (citations omitted) (emphasis added).

306. *See id.* at 1251.

307. 668 N.E.2d 1289 (Ind. Ct. App. 1996), *trans. denied*, 679 N.E.2d 1327 (Ind. 1997).

308. *Id.* at 1292.

309. *Id.* at 1292-93.

310. *Id.* at 1293.

311. *Id.* at 1292.

1996 SURVEY OF THE UNIFORM COMMERCIAL CODE IN INDIANA

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INTRODUCTION

This Survey summarizes and comments on recent developments of special interest affecting the Uniform Commercial Code in Indiana.¹ Although particular attention has been paid to cases decided by Indiana state courts and by federal courts applying Indiana law, Seventh Circuit cases dealing with issues not yet clearly addressed by the Indiana courts also have been included.

I. ARTICLE 2—SALES

A. *Additional Terms, the “Battle of the Forms” Under U.C.C. Section 2-207 and Usage of Trade*

U.C.C. section 2-207 has been a fertile source of litigation relating to the “battle of the forms,” as the cases in this Survey readily demonstrate. One Indiana case in the ongoing skirmishes, *Wilson Fertilizer & Grain, Inc. v. ADM Milling Co.*,² yielded the somewhat unhappy result of allowing a buyer to keep goods without paying for them.³ ADM Milling purchased grain from Wilson Fertilizer & Grain. The court stated that the contract between the parties was “facilitated” by a broker who sent each party a confirmation, but the opinion is unclear as to what this means. The broker’s confirmations did not mention arbitration. The buyer also sent its own confirmation directly to the seller. The buyer’s confirmation said nothing about arbitration or any limitation of action, but did contain “boiler plate language which state[d]: ‘This contract is also subject to the

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1. IND. CODE §§ 26-1-1-101 to -9-507 (1993 & Supp. 1996). Unless the Indiana version of the Uniform Commercial Code differs from the Official Draft, citation will be to the Uniform Act, rather than to sections of the Indiana Code. (E.g., U.C.C. § 2-207 rather than IND. CODE § 26-1-2-207.) Citation to the Uniform Commercial Code of other states will be to the Uniform Act as well.

2. 654 N.E.2d 848 (Ind. Ct. App. 1995), *trans. denied*. *Wilson* was briefly summarized in last year’s Survey. See Comment, *1995 Survey of Indiana Commercial Code*, 29 IND. L. REV. 1127, 1131-33 (1996).

3. See *Wilson*, 654 N.E.2d at 855 (Kirsch, J., concurring in part and dissenting in part) (characterizing the result in *Wilson* as a game of “Legal Gotcha” won by the buyer).

Trade Rules of the National Grain and Feed Association currently in effect.”⁴ Included in these trade rules were an arbitration provision and a limitation period of one year. When ADM failed to pay and Wilson sued, the trial court granted ADM’s motion to dismiss based on the trade rules arbitration provision.

On appeal, the parties agreed that they had a contract, that they were both merchants, and that the provisions in ADM’s form were additional terms. The issue for resolution was whether the additional terms materially altered the contract so as not to become part of it pursuant to U.C.C. section 2-207(2)(b).⁵

At the outset of its analysis, the court correctly observed that the test of whether an additional term constitutes a material alteration under U.C.C. section 2-207(2)(b) is whether its “incorporation into the contract without express awareness by the other party would result in surprise or hardship.”⁶ In rejecting Wilson’s argument that an arbitration clause is a material alteration as a matter of law, the court refused to adopt the New York rule that an additional arbitration clause is a material alteration *per se*.⁷ Instead, the court concluded that whether an arbitration clause (or any other term) constitutes a material alteration is a question of fact, dependent on the circumstances of each case.⁸

Having taken the position that it is a question of fact whether an arbitration clause constitutes a material alteration that causes undue surprise or hardship, the court correctly placed the burden of proving that fact on Wilson in this case, as the party who was seeking to avoid enforcement of the term. The burden of proving the existence of a trade usage to arbitrate, however, and that of establishing Wilson was bound by the trade usage because it was “in the trade,” should have been

4. *Id.* at 849.

5. Section 2-207 provides in pertinent part:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

U.C.C. § 2-207(1)-(2).

6. *Wilson*, 654 N.E.2d at 850 (quoting *Maxon Corp. v. Tyler Pipe Indus., Inc.*, 497 N.E.2d 570, 576 (Ind. Ct. App. 1986)).

7. *Id.* at 852. The New York rule, with which U.C.C. scholars White & Summers agree, also provides that if usage of trade calls for arbitration, that usage is incorporated into the original agreement and thus its presence in the last form to be sent would not constitute a material alteration. See 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3, at 27-28 (4th ed. 1995).

8. *Wilson*, 654 N.E.2d at 852 (citing *Luedtke Eng’g Co. v. Indiana Limestone Co.*, 740 F.2d 598, 600 (7th Cir. 1984)).

placed on ADM as the party seeking to apply the trade usage. Both issues should have been determined in an evidentiary hearing rather than by the trial court itself upon argument of counsel on a motion to dismiss. The court of appeals sidestepped this issue by stating: "As was the trial court, we are unpersuaded by Wilson's argument that it should not be made to bear the burden of objecting to the additional terms in the contract or inquiring as to provisions incorporated by reference."⁹

By suggesting that Wilson should have read and objected to the unfavorable term, the court demonstrated both the philosophy underlying its decision and a misunderstanding of the policy and application of section 2-207. The court ignored its own statement earlier in its opinion that the issue was whether incorporation of the term "'without express awareness by the other party would result in surprise or hardship.'"¹⁰ The issue is not whether Wilson should have read the form, as it would have been if there were a single form signed by both parties and Wilson objected to a term he had not read before signing. Rather, the issue is whether, after there was a contract between the parties, the term added by ADM's form would cause unfair surprise or hardship to Wilson, who was unaware of the additional term. Wilson's failure to read and object is irrelevant to this inquiry. The court's approach would read section 2-207(2)(b) out of the statute: if the recipient of a form must always read the boilerplate and object to it, as the court seems to assume, there would be no need for the "material alteration" language of section 2-207(2)(b).¹¹ As the First Circuit recently observed,

The reality of modern commercial dealings . . . is that not all participants read their forms. The sender of the last form . . . could insert virtually any conditions it chooses into the contract, including conditions contrary to those in the initial form. The final form, therefore, would give its sender the power to re-write the contract[, which is contrary to the philosophy of U.C.C. section 2-207.]¹²

Judge Kirsch's opinion in *Wilson*, concurring in part and dissenting in part,

9. *Id.* at 854.

10. *Id.* at 850 (quoting *Maxon Corp. v. Tyler Pipe Indus. Inc.*, 497 N.E.2d 570, 576 (Ind. Ct. App. 1986)) (emphasis added).

11. The *Wilson* court lavishes praise on the farmer in *Continental Grain Co. v. Followell*, 475 N.E.2d 318 (Ind. Ct. App. 1985), who in fact did read and object. *Wilson*, 654 N.E.2d at 854-55. The *Followell* decision, however, is seriously flawed. See Harold Greenberg, *Recent Developments in Indiana Commercial Law*, 28 IND. L. REV. 1125, 1127-34 (1995). Moreover, *Followell* is irrelevant to *Wilson*. The *Followell* court treated the issue as one involving an offer followed by a response that did not operate as an acceptance so as to form a contract. In *Wilson*, the issue involved one party adding a term to an *already existing* contract.

12. *Ionics, Inc. v. Elmwood Sensors, Inc.*, 110 F.3d 184, 189 (1st Cir. 1997). *Ionics* overruled *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), a case upon which *Followell* expressly relied. Although *Ionics* involved an exchange of forms with directly contradictory terms, its approach to section 2-207 applies equally well to *Wilson*, in which there was an oral agreement followed by an additional term not read by the recipient seller.

has the better position: the court's statement of the law may have been correct, but it was inappropriate to dismiss the action without an evidentiary hearing on crucial issues of fact, particularly whether Wilson, who was unfamiliar with and did not read either the trade rules or the language incorporating them, was unfairly surprised by ADM's attempt to incorporate them into the contract.¹³

B. More Additional Terms and the Battle of the Forms

The parties in *Waukesha Foundry, Inc. v. Industrial Engineering Inc.*¹⁴ were engaged in an ongoing relationship in which buyer would order and seller would manufacture to buyer's specifications castings used in the production of television picture tubes. Seller's acknowledgment forms to sixty orders over four years,¹⁵ as well as hundreds of packing slips and invoices, contained a disclaimer or modification of warranties, a limitation of remedies exclusively to repair, replacement, or credit, and an exclusion of consequential damages. When the relationship soured due to buyer's financial difficulties, seller sued for payment of outstanding invoices. Buyer counterclaimed for consequential damages allegedly suffered as a result of seller's delivery of defective castings. At issue was whether the disclaimer of warranties and limitation of remedies, terms admittedly additional to the offer to buy expressed in buyer's order forms, became part of the contract pursuant to U.C.C. section 2-207(2)(b).

Applying Wisconsin law, the Seventh Circuit declared that "[a]n alteration is material if the party against whom it is sought to be enforced would be ambushed by its addition to the contract."¹⁶ The court further reasoned, however, that there must be an examination into the relationship of the parties to determine whether the party who otherwise would be adversely affected by the additional term had accepted that term notwithstanding the arguable ambush. In this case, the court observed, buyer had frequently availed itself of the very remedies set forth in the packing slips and invoices by sending defective castings to seller for replacement or credit, thus consenting by course of performance to the inclusion of the additional remedy terms in the contract between them.

The court's position seems sound. Most courts agree that materially altering additional terms do not become part of the contract merely because the affected party silently proceeds with performance under the contract. Moreover, in *Maxon v. Tyler Pipe Industries*,¹⁷ the Indiana Court of Appeals ruled that the fact an additional term appeared regularly in prior invoices over a long series of

13. See *Wilson*, 654 N.E.2d at 856 (Kirsch, J., concurring in part and dissenting in part).

14. 91 F.3d 1002 (7th Cir. 1996).

15. There was some dispute as to whether buyer ever received seller's acknowledgment forms. See *id.* at 1007.

16. *Id.* at 1009. This statement is substantially similar to the observation of the Indiana Court of Appeals in *Wilson* that a "material alteration" is a term that would result in undue surprise or hardship to the recipient who had not read it. *Wilson*, 654 N.E.2d at 850 (citing *Maxon Corp. v. Tyler Pipe Indus., Inc.*, 497 N.E.2d 570, 576 (Ind. Ct. App. 1986)).

17. 497 N.E.2d 570 (Ind. Ct. App. 1986).

transactions and buyer never objected to it did not mean that the term became part of the contract without at least being called to that party's attention. In *Waukesha Foundry*, however, the affected party—the buyer—actually followed the procedures set forth in the additional terms without a murmur of objection during an ongoing relationship that lasted more than four years. Although the term excluding consequential damages initially might have ambushed the buyer by causing unfair surprise or hardship, buyer's regular adherence to the limited remedy provisions demonstrated knowledge of and agreement to the exclusion of consequential.

Buyer also contended that the limited remedy failed of its essential purpose under U.C.C. section 2-719(2),¹⁸ thereby opening the door to all available Code remedies, including recovery of consequential damages. The Seventh Circuit rejected this argument, finding that the remedy had operated precisely as it was designed to: seller fulfilled its obligation to replace defective castings or to give appropriate credit. Mere delivery of defective goods does not trigger section 2-719(2). If it did, every non-conforming delivery would subject the seller to all remedies under the Code, notwithstanding an agreed limitation of remedies. The complaining party must show that it suffered harm which the limited remedy was incapable of curing. Buyer in *Waukesha Foundry* failed to make this showing.¹⁹

C. Shrinkwrap Licenses, Offer, Acceptance, and More Section 2-207

A “shrinkwrap license” is a contractual term that “gets its name from the fact that retail [computer] software packages are covered in plastic or cellophane ‘shrinkwrap,’ and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package.”²⁰ Other vendors require the user to indicate acceptance of the license's terms by opening an envelope inside the package, by use of the software itself, by clicking the mouse arrow on a “yes” box, or by some other method.²¹

18. “Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.” U.C.C. § 2-719(2) (1977).

19. *Waukesha Foundry*, 91 F.3d at 1010.

20. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

21. See Stephen J. Davidson & Michael J. Wurzer, *Shrink-Wrap Licenses: The Continuing Controversy* 673 (PLI/Pat., Copyrights, Trademarks, and Lit. Prop. Practice Course Handbook Series No. 453, 1996); David L. Hayes, *Shrinkwrap License Agreements: New Light on a Vexing Problem*, 15 HASTINGS COMM. & ENT. L.J. 653, 654 (1993).

Similarly, when acquiring, downloading, and installing software electronically over the Internet, the user may be required to review a license agreement and indicate her acceptance of the agreement's terms before using the software. The software may even be programmed to require affirmative indication of agreement before it can be used. See Carey R. Ramos & Joseph P. Verdon, *Shrinking and Click-On Licenses After ProCD v. Zeidenberg*, COMPUTER LAW., Sept. 1996, at 1.

The drafters of a new Article 2B to the Uniform Commercial Code, discussed *infra* at notes 34-42 and accompanying text, refer to such licenses as “mass market” licenses.

In the first decision to consider the validity of shrinkwrap licenses in retail sales of computer software, *ProCD, Inc. v. Zeidenberg*,²² the Seventh Circuit held that "shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)."²³ At a cost of more than \$10 million, ProCD, Inc. had compiled a computer database consisting of information from more than 3000 telephone directories, which it offered for sale on CD-ROM discs under the tradename SelectPhone™. Information could be retrieved from the discs according to any number of criteria with the aid of a program that ProCD also placed on the discs. Because the information was of considerable value to commercial enterprises, ProCD decided to sell its database to the general public for consumer use at a much lower price than it sold the database to commercial users. The box for every consumer version stated that restrictions on use of the software were set forth in an enclosed license. That license, which restricted the consumer version to personal use, was printed in the user's guide, encoded on the

22. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), *rev'g* 908 F. Supp. 640 (W.D. Wis.). See Ramos & Verdon, *supra* note 21, at 3.

23. *ProCD, Inc.*, 86 F.3d at 1449. Three prior cases touched on the shrinkwrap issue, but did not deal with it directly. In *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988), the Fifth Circuit struck down a Louisiana statute that expressly made shrinkwrap licenses valid as contrary to and thus preempted by federal copyright law. The trial court had found that such contracts were invalid as contracts of adhesion. The Fifth Circuit did not discuss the issue.

Step-Saver Data Systems Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991), involved telephone orders for software by a reseller who loaded the program on computers it sold to retail buyers. The Third Circuit concluded that the sale was completed when the seller accepted the telephoned orders, which detailed the items to be purchased, the price and the shipping and payment terms, but no other terms, restrictions or limitations. Thus, additional terms contained in the shrinkwrap license, which the reseller-buyer had not discussed on the telephone, did not become part of the contract because they materially altered that contract under U.C.C. section 2-207(2)(b).

Arizona Retail Systems v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993), was similar to *Step-Saver* in that it involved a telephone sale, but the software seller based its argument on the section 2-209 rules on contract modification rather than on section 2-207. Again, the shrinkwrap license was held inapplicable, this time because there was no express agreement to the modification. See Davidson & Wurzer, *supra* note 21; Hayes, *supra* note 21.

The issue of shrinkwrap license validity in sales transactions has generated much comment. In addition to the previously cited articles, see, e.g., David A. Einhorn, *Boxtop Licenses and the Battle-of-the-Forms*, 5 SOFTWARE L.J. 401 (1992); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995); Gary H. Moore & J. David Hadden, *On-Line Software Distribution: New Life for "Shrinkwrap" Licenses*, COMPUTER LAW., Apr. 1996, at 1; Celeste L. Tito, *The Servicewrap: "Shrinkwrap" for Mass-Marketed Software Services*, COMPUTER LAW., May 1996, at 19; D.C. Toedt, III, *Counterpoint: Shrinkwrap License Enforceability Issues*, COMPUTER LAW., Sept. 1996, at 7; Holly Keesling Towle, *Licensing and the Uniform Commercial Code* 147 (PLI/Pat., Copyrights, Trademarks, and Lit. Prop. Practice Handbook Series No. 454, 1997).

discs, and visible on the screen every time the software was run.²⁴

Defendant Zeidenberg bought a consumer version of the SelectPhone™ database. He then formed the co-defendant corporation, and that corporation placed the database on an Internet web page and sold the information at a price substantially lower than that charged by ProCD. ProCD brought an action to enjoin defendants from distributing SelectPhone™ information on the Internet, alleging both copyright infringement and breach of the license agreement.

On cross-motions for summary judgment, the trial court ruled that defendants had neither infringed ProCD's copyright nor assented to the license agreement and the restrictions it contained. With respect to the contract issues, which are the subject of this discussion, the trial court held that (1) the transaction was a sale of goods governed by U.C.C. Article 2; (2) pursuant to U.C.C. sections 2-204 and 2-206,²⁵ defendant's payment for the software constituted an acceptance of the

24. As described by the trial court,

The user guide includes a series of terms entitled, "Single User License Agreement."

The agreement states in its opening paragraph:

Please read this license carefully before using the software or accessing the listings contained on the discs. By using the discs and the listings licensed to you, you agree to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software, listings that may have been exported, the discs and the User Guide to the place where you obtained it.

....

Before a user can access the listings a field appears on the computer screen, stating:

The listings contained within this product are subject to a License Agreement.

Please refer to the Help menu or to the User Guide.

In addition, most screens contain the following warning:

The listings on this product are licensed for authorized users only.

The user agreement provides that copying of the software and the data may be done only for individual or personal use and that distribution, sublicense or lease of the software or the data is prohibited. The agreement provides expressly that:

[Y]ou will not make the Software or the Listings in whole or in part available to any other user in any networked or time-shared environment, or transfer the Listings in whole or in part to any computer other than the computer used to access the Listings.

The SelectPhone™ box mentions the agreement in one place in small print. The box does not detail the specific terms of the license.

ProCD, Inc. v. Zeidenberg, 908 F. Supp 640, 644-45 (W.D. Wis.), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

25. Section 2-204(1) states, "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of

software retailer's offer to sell, which had been made by placing the software on the shelf; and (3) whether considered under section 2-207 or section 2-209,²⁶ the license agreement restrictions were nothing more than proposals for addition to or modification of the contract about which the defendant buyer did not know at the time of acceptance of payment, to which he did not agree, and which therefore did not bind him. As to the reference to the restrictions on the package, the trial court stated, "Mere reference to the terms at the time of the initial contract formation does not present buyers an adequate opportunity to decide whether they are acceptable. They must be able to read and consider the terms in their entirety."²⁷

The Seventh Circuit agreed with the district court that, notwithstanding the characterization as a license, the transaction was a sale of goods governed by the UCC.²⁸ The court also agreed that a buyer cannot be bound by hidden terms. Contrary to the district court, however, the Seventh Circuit ruled that defendant did agree to be bound by the license's terms. The court rejected the position that the entire agreement must appear on the box, stating

Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities,

such a contract." U.C.C. § 2-204(1) (1995).

Section 2-206(1)(a) states, "Unless otherwise unambiguously indicated by the language or circumstances[,] an offer shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." *Id.* § 2-206(1)(a).

26. Section 2-209(1) states, "An agreement modifying a contract within this Article needs no consideration to be binding." *Id.* § 2-209(1).

27. *ProCD*, 908 F. Supp. at 654. The district court's conclusion has been sharply criticized:

The district court's ruling in *ProCD* demonstrates how far judicial interpretation of EULAS [End User License Agreements—i.e., shrinkwrap licenses] departs from commercial reality in software transactions. The end user in *ProCD* was notified four separate times (on the product package, in the user guide, upon installation of the software, and prior to gaining access to the product's data) that the use of the software was subject to the EULA

Robert W. Gomuliewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 338 n.4 (1996).

28. *ProCD*, 86 F.3d at 1450. The only Indiana appellate case dealing with a sale of computer software is *Data Processing Services, Inc. v. L. H. Smith Oil Corp.*, 492 N.E.2d 314 (Ind. Ct. App. 1986), in which the court held that the development and sale of software containing an accounting system specially prepared to meet the buyer's needs and unaccompanied by a sale of hardware was more analogous to a sale of legal or accounting advice than to a sale of goods and, therefore, was not governed by the UCC *Id.* at 318. The court noted that the tangible floppy discs may have been incidentally involved, but it was the skill and knowledge of the programmer that was the essence of the transaction. *Id.* Language in the case, however, seems to indicate that a mass-marketed computer program already on discs would be a sale of goods. *Id.* at 318-19.

may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike.²⁹

The Seventh Circuit also rejected the district court's conclusion that a contract was formed when defendant, in response to the offer of sale made by placing the package on the shelf, accepted the offer and formed the contract "simply by paying the price and walking out of the store."³⁰ Rather, ProCD, as master of its offer to sell, "proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. . . . He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance [of its terms]."³¹

The Seventh Circuit's result appears to be both economically sound and legally correct. Apparently, at the time defendant purchased the software, he was aware that he was buying the consumer version, not the commercial version, and should have realized that there were greater differences than merely price between the two versions. Thus, even if the trial court were correct that the contract was formed when Zeidenberg paid for the software and left the store, Zeidenberg knew (or should have known) that there were restrictions of some kind on the use of the software. His reasonable expectation was that the contract of sale was for a product for consumer use. Moreover, in this rapidly expanding computer age, even the minimally computer literate know that computer software usually contains various terms, conditions, and instructions in the program itself to which the user must express assent in some fashion before the software can be used. In fact, after Zeidenberg's first purchase, he purchased two updated versions of SelectPhoneTM, so he obviously knew that there was a license agreement inside.³²

29. *ProCD*, 86 F.3d at 1451.

30. *Id.* at 1452.

31. *Id.* (citing U.C.C. § 2-204(1) (1995)) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").

Commenting on *ProCD*, the court in *Micro Star v. Formgen, Inc.*, 942 F. Supp. 1312, 1317 (S.D. Cal. 1996), stated,

[T]here was no question that the movant knew of the license, and knew that by his actions he was consenting to its restrictions. This was so because the box contained a statement that users were bound by the license agreement enclosed, and the license was printed on the CD ROM disc, in the manual, and appeared on the screen every time the program ran.

32. The district court stated that Zeidenberg subsequently purchased two updated versions of SelectPhoneTM, and may have known the terms of the user agreement at the time of those purchases. The district court noted, however, that a decision on whether Zeidenberg was bound by the agreement at the time of those purchases was "a close call," particularly because the software manufacturer was free to change the agreement between the purchases of various versions. *ProCD*,

Further, the inclusion of such terms in the user's manual and in the software itself, in the age of computer literacy, may have by now risen to the status of a usage of trade that need not be expressed at all at the time when the contract is formed, yet is a part of the contract.³³

A further comment on the future of shrinkwrap licenses is in order. The sponsors of the UCC, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) currently are engaged in a major revision of Article 2. As an offshoot of that project, a new Article 2B dealing with licensing of intellectual property, including computer software, is being drafted as well. Both the district court and the Seventh Circuit referred to a draft that would validate shrinkwrap or "standard-form user" licenses.³⁴ The district court suggested that this draft cast doubt on the present validity of such licenses. The Seventh Circuit found this reasoning flawed, stating that "[n]ew words may be designed to fortify the current rule with a more precise text that curtails uncertainty."³⁵

New words also may be necessary to deal with circumstances that were not envisioned when the old words were written. The original version of Article 2 was written for a 1950s economy when the software industry, now a major part of the economy, did not exist and was not even envisioned.³⁶ That the current law does not deal expressly with shrinkwrap licenses does not mean that law cannot be applied in the spirit of the Code's admonition that it "be liberally construed and applied to promote its underlying purposes and policies,"³⁷ including "moderniz[ation] of the law governing commercial transactions" and permit[ting] the continued expansion of commercial practices through custom, usage and agreement of the parties."³⁸

In dealing with shrinkwrap licenses, the drafters of Article 2B have created the idea of a "mass-market license," one which typically involves a contract "in the nature of a standard form used in multiple transactions without any opportunity for bargaining."³⁹ Section 2B-308(a) provides that "a party adopts the terms of mass-

Inc. v. Zeidenberg, 908 F. Supp. 640, 654 (W.D. Wis.), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

33. See U.C.C. § 1-205(2) (1995) ("A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.").

34. See *ProCD*, 86 F.3d at 1452; *ProCD*, 908 F. Supp. at 655. The courts referred to section 2-2203 but neither opinion indicated the date of the draft to which they were referring. There have been several drafts since the date of the trial court opinion, and the sections have been renumbered.

35. *ProCD*, 86 F.3d at 1452.

36. See Preface to Article 2B Licenses (Draft Dec. 12, 1996), pt. 1, at 4-5 (discussing Modern Economy and Law Reform). Drafts of Article 2B are available through the Internet on the Uniform Commercial Code Article 2B Revision Home Page. <<http://www.lawlib.uh.edu:80/ucc2b>> (visited July 30, 1997).

37. U.C.C. § 1-102(1) (1995).

38. *Id.* § 1-102(2)(a), (b).

39. Preface to Article 2B Licenses (Draft Dec. 12, 1996), pt. 1, at 23-24 (discussing Mass

market license if the party agrees, including by manifesting assent, to the mass-market license before or in connection with the initial performance or use of or access to the information.”⁴⁰ Section 2B-112 provides that a party manifests assent if, after an opportunity to review the terms, she engages in conduct “that the record [software] conspicuously provides or the circumstances, including the terms of the record, clearly indicate constitute acceptance” of the terms, and has an opportunity to decline the terms, but mere retention without objection is not assent.⁴¹ The Reporter’s Notes to this section state that “an affirmative act of clicking on a displayed button [with a mouse] in response to an on screen description that this act constitutes acceptance of a particular term or an entire contract” would be effective.⁴² Applying these proposed provisions to *ProCD* would yield the same result as that reached by the Seventh Circuit without the necessity of determining whether the contract was formed at the cashier’s desk in the software store or after the buyer reviewed the user’s manual and the computer screens and clicked his intention to use the software.

One comment about section 2-207 in the Seventh Circuit’s opinion causes some concern. The court stated, “Our case has only one form; UCC § 2-207 is irrelevant.”⁴³ Although section 2-207 may often involve a battle of two forms in an offer-acceptance context where the response to the offer differs in some respect, section 2-207 clearly is applicable as well when an oral agreement involving words and conduct, but no forms, is followed by a single written confirmation by one of the parties. The only thing that saves the court’s analysis in this instance is its conclusion that there was not yet a contract until defendant Zeidenberg assented to the license agreement in the manner set forth therein. Once he knew of the license agreement and its limitations, in the court’s analysis, his use of the software was an expression of acceptance of all of the terms.

Market Definition and Use). “Mass-market license” is defined in section 2B-102(28) as “a standard form that is prepared for and used in a mass-market transaction.” U.C.C. § 2B-102(28) (NCCUSL Annual Meeting Draft July 25-Aug. 1, 1997). “Mass-market transaction” is defined as “a transaction in a retail market for information involving information directed to the general public as a whole under substantially the same terms for the same information, and involving an end-user licensee that acquired the information in a transaction under terms and in a quantity consistent with an ordinary transaction in the general retail distribution.” *Id.* § 2B-102(29). Certain transactions are expressly excluded: (1) nonconsumer transactions involving more than an as yet to be established amount; (2) transactions involving information specially prepared for the licensee; (3) licenses of the right to publicly perform or display a copyrighted work; and (4) commercial site licenses and access contracts between businesses. *Id.* § 2B-102(29)(A)-(D).

40. *Id.* § 2B-308(a).

41. *Id.* § 2B-112(a), (b).

42. *Id.* § 2B-112 reporter’s note 3. It should be noted that “there have been strong objections voiced to these provisions, and it remains to be seen if this standard industry practice is validated in Article 2B.” Terrence P. Maher & Margaret L. Milroy, *Licensing in a New Age—Contracts, Computers and the UCC*, BUS. L. TODAY, Sept./Oct. 1996, at 22, 26.

43. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996), *rev’d* 908 F. Supp. 640 (W.D. Wis.).

D. Telephone Orders and Section 2-207

In *Hill v. Gateway 2000, Inc.*,⁴⁴ the Seventh Circuit applied the reasoning of *ProCD* to a case involving the purchase of a computer by telephone. The buyers, in response to a computer magazine advertisement that described the components and technical characteristics of a specific computer system manufactured by the seller,⁴⁵ ordered a computer over the telephone and gave a credit card number by way of payment.⁴⁶ The box that arrived contained the computer, “a ‘Standard Terms and Conditions Agreement,’ and a ‘Three Year Limited Warranty,’ which had various exclusions and limitations.”⁴⁷ The Standard Terms and Conditions Agreement included a dispute resolution clause that required submission of all disputes to arbitration and disclaimed liability for consequential damages,⁴⁸ as well as a statement that these terms “govern unless the customer returns the computer within 30 days.”⁴⁹

Dissatisfied with the components incorporated into the computer system and their performance, the buyers filed a multi-count class action in which they alleged violations of the warranty provisions of the UCC, the Magnusson-Moss Federal Warranty Act, the Racketeer Influenced and Corrupt Organization Act (RICO), and the Illinois and South Dakota Consumer Fraud Acts.⁵⁰ When the seller moved to enforce the arbitration clause, the district court refused, stating that “[t]he present record is insufficient to support a finding of a valid arbitration agreement . . . or that the plaintiffs were given adequate notice of the arbitration clause.”⁵¹

The Seventh Circuit relied upon its decision in *ProCD* to find that the arbitration provision was binding upon the buyers. Refusing to limit *ProCD* to the computer software context, the court stated, “Gateway shipped the computers with the same sort of accept-or-return offer *ProCD* made to users of its software.”⁵² The court continued:

Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents

44. 105 F.3d 1147 (7th Cir. 1997). A detailed recitation of the facts of this case appears in the district court memorandum opinion and order. See *Hill v. Gateway 2000, Inc.*, 1996 WL 650631, No. 96C4806 (N.D. Ill. Nov. 7, 1996).

45. *Hill*, 1996 WL 650631, at *1-2.

46. *Hill*, 105 F.3d at 1148.

47. *Hill*, 1996 WL 650631, at *2.

48. *Id.*

49. *Hill*, 105 F.3d at 1148.

50. *Hill*, 1996 WL 650631, at *1.

51. *Hill*, 105 F.3d at 1148. The opinion of the district court in which it denied the seller’s motion to enforce the arbitration clause is not reported, nor is it presently available in any electronic database. The memorandum opinion and order only deal with the motion to certify the class.

52. *Id.*

to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up⁵³

As it did in *ProCD*, the court stated that, notwithstanding the buyer's argument, section 2-207 was irrelevant to the transaction. The issue in both cases was

how and when the contract was formed—in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general “send me the product,” but after the customer has had a chance to inspect both the item and the terms.⁵⁴

Because the buyers failed to return the computer within thirty days from purchase as required by the Standard Terms and Conditions Agreement included in the computer box, they had accepted the seller's offer under the seller's terms and, therefore, were required to arbitrate.

The Seventh Circuit's approach certainly is innovative. Indiana courts have long adhered to the general rule that modifications of warranties and limitations of remedies not brought to the buyer's attention until after the sale is made (for example, terms included in a booklet in the glove compartment of a new car) are ineffective.⁵⁵ In prior times, warranties, disclaimers, limitations and other terms, whether favorable to one party or the other, were either discussed specifically or set forth in the writing signed by both parties before payment and delivery. Section 2-207 was drafted to deal in part with offeree's responses that indicated acceptance but contained terms that changed the terms of the contract that was formed, thereby trapping the offeror into a contract different from that which she expected would control the transaction. In the setting of both *ProCD* and *Hill*, the buyers, at the time of payment and delivery, knew that there were terms as yet unseen. Some of these terms were of benefit to the buyers; some may have limited their rights and remedies. But the reasonable expectation of the buyers was that there were terms yet to be read. As long as an opportunity exists to return the goods for full refund in the absence of willingness to abide by those terms, thereby indicating rejection of the seller's offer, the reasonable expectations are fulfilled.⁵⁶

53. *Id.* at 1149.

54. *Id.*

55. *See Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 948 (Ind. Ct. App. 1982) (citing cases from other jurisdictions).

56. The *Hill* court touches on the issue of what happens if the return requirement is onerous—for example, if the expense of shipping were unreasonably high. “What the remedy would be in such a case—could it exceed the shipping charges?—is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include some important terms, and they did not seek to discover these in advance.” *Hill*, 105

As noted above, NCCUSL and the ALI are presently engaged in a revision of Article 2. One of the problems with which the drafters are struggling relates to standard form contracts such as those involved in both *ProCD* and *Hill*.⁵⁷ How the drafters ultimately will deal with the issue remains to be seen.

II. ARTICLES 3 AND 4—NEGOTIABLE INSTRUMENTS AND BANK DEPOSITS AND COLLECTIONS

UCC Articles 3 and 4 were revised by NCCUSL and the ALI in 1990. Indiana adopted revised Articles 3 and 4, effective July 1, 1994.⁵⁸ As is the case with the decisions discussed in this Survey, however, the great majority of cases still are being decided under pre-revision Articles 3 and 4 because they involve transactions that took place before the effective date of the revisions.

A. Definition of "Negotiable Instrument"

Article 3 only applies to "negotiable instruments."⁵⁹ Non-negotiable instruments are governed by common law principles.⁶⁰ Under Article 3, an instrument's negotiability is determined by whether the instrument, on its face, meets the formal requirements for negotiability set out in Article 3. Under pre-revision U.C.C. section 3-104, these requirements are that the instrument (1) be signed by the maker or drawer; (2) "contain an unconditional promise or order to pay a sum certain in money and no other promise" except those authorized by Article 3; (3) be payable either on demand or at a definite time; and (4) be payable either to order or to bearer.⁶¹ If the face of the instrument satisfies these requirements, then it is a negotiable instrument; if it does not, then it is non-negotiable.

F.3d at 1149.

57. Compare U.C.C. § 2-206 (Nov. 1996 Draft) with U.C.C. §§ 2-205, 2-206 and 2-207 (NCCUSL Annual Meeting Draft July 25-Aug. 1, 1997). The earlier draft dealt specifically with the concept of standard form contracts, such as those contained in *ProCD* and *Hill*. The later draft deleted rules dealing with standard forms. In the Reporter's Notes to section 2-205, the Reporter discussed *ProCD* and *Hill*, stated questions raised at a May 1997 meeting of the Drafting Committee as to whether Article 2 adequately supports the decisions, and proposed a solution. However, no final action was taken on the proposal.

58. Act of Apr. 30, 1993, No. 222, §§ 5-45, 1993 Ind. Acts 4222, 4231-4316.

59. U.C.C. § 3-102(a)(1990); U.C.C. § 3-103 cmt. 1 (1989). Citation to the pre-revision Article 3 is indicated by the date 1989. Citation to revised Article 3 is indicated by the date 1990.

60. Pre-revision Article 3 contained one exception to this rule: pre-revision Article 3 applied to a non-negotiable instrument if the only reason the instrument was non-negotiable was that it was not payable to order or bearer and the terms of the instrument did not preclude transfer. U.C.C. § 3-805 (1989). There could not, however, be a holder in due course of such an instrument. See *id.* This provision was deleted in the revision.

61. U.C.C. § 3-104(1)(a)(d) (1989). Revised section 3-104 contains similar requirements. U.C.C. § 3-104(a)(1)-(3) (1990).

In *Yin v. Society National Bank Indiana*,⁶² the Indiana Court of Appeals addressed for the first time the question of whether a line of credit was a negotiable instrument governed by Article 3. Plaintiff Society National Bank Indiana had entered an agreement with U.S.A. Diversified Products (USAD) to loan USAD up to \$2,000,000 in the form of an operating line of credit. The agreement was evidenced by a note, which was signed by Davis, both as president of USAD and individually, and by defendants Yin and Kung in their individual capacities as accommodation parties.⁶³ Subsequently, Society agreed to give USAD a sixty day extension of the due date of the note. Davis represented that he would obtain the signatures of Yin and Kung on the extension note, but the parties agreed for purposes of Society's motion for summary judgment that Yin and Kung's signatures on the extension note were forgeries. USAD defaulted on the line of credit and Society brought an action to collect the debt. Yin and Kung asserted defenses to payment based on their accommodation party status. They argued that their obligation had been discharged by the grant of an extension of time to USAD, and by Society's failure to notify them of misconduct by USAD.⁶⁴

Applying the pre-revision Article 3, the trial court held that the line of credit was a negotiable instrument governed by Article 3,⁶⁵ and that Yin and Kung therefore were limited to the suretyship defenses contained in pre-revision U.C.C. section 3-606.⁶⁶ The trial court granted partial summary judgment in favor of Society against Yin and Kung for \$2,160,331.73, including interest, attorney fees and expenses, concluding that the extension (the suretyship defense included in section 3-606)⁶⁷ did not discharge their liability on the note.⁶⁸

On appeal, Yin and Kung argued that the trial court had erred in finding that the agreement for a line of credit was a negotiable instrument, and in denying them the benefit of common law suretyship defenses.⁶⁹ The Indiana Court of Appeals held that the line of credit was not a negotiable instrument and that, therefore, the applicable law was Indiana common law, including common law suretyship defenses.⁷⁰

The court found that the line of credit failed to meet the formal requisites of

62. 665 N.E.2d 58 (Ind. Ct. App. 1996), *trans. denied*.

63. Society admitted for purposes of its motion for summary judgment that Yin and Kung were accommodation parties. *See id.* at 63.

64. Yin and Kung presented evidence that USAD was not abiding by certain terms of the loan agreement and was impairing collateral securing the loan, and that Society had acquiesced in, and perhaps encouraged, USAD's misconduct. *See id.* at 65.

65. *See id.* at 62.

66. *See id.* at 67 (Sharpnack, C.J., concurring).

67. "The holder discharges any party to the instrument to the extent that without such party's consent the holder (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person" U.C.C. § 3-606(1)(a) (1989).

68. *Yin*, 665 N.E.2d at 61, 63.

69. *Id.* at 62, 67.

70. *See id.* at 63.

a negotiable instrument both because it did not contain a "sum certain" and because it did not contain "an unconditional promise or order to pay."⁷¹ The court reasoned that the line of credit was not for a sum certain because USAD was under no obligation to make any draws upon the line of credit, and the draws that it chose to make could be in varying amounts. Thus, "an important feature of the line of credit" was that "in order to ascertain the principal amount owed, one must look beyond the agreement itself" to the history of USAD's draws.⁷² Therefore, the court concluded that "[b]ecause of the potentially variable principal which results from such an arrangement, the line of credit contains no sum certain."⁷³ The court found that the agreement did not contain an unconditional promise to pay because Society had conditioned USAD's ability to make draws under the line of credit upon the sufficiency of USAD's accounts receivable.⁷⁴ The court then went on to hold that there were genuine issues of material fact relating to Yin and Kung's common law suretyship defense based on Society's failure to notify them of USAD's misconduct which made the trial court's grant of partial summary judgment inappropriate.⁷⁵

Although the court may have reached the right result in *Yin*, its negotiability analysis is clearly misguided. First, the court's conclusion that the agreement did not contain an unconditional promise to pay because Society's obligation to make advances under the line of credit agreement was not unconditional is simply wrong. It is the *maker's* promise to pay, not the *lender's* promise to make the loan, that must be unconditional.⁷⁶ More fundamentally, as Chief Judge Sharpnack stated in his concurrence, the issue is not whether the line of credit constitutes a negotiable instrument, but rather "whether the document in question is a negotiable instrument."⁷⁷ The "document in question" was a promissory note, which stated:

On April 30, 1992, for value received, the undersigned ("Borrower") promises to pay to the order of SOCIETY BANK, INDIANA ("BANK") at its principal office in South Bend, Indiana: Two Million and 00/100 DOLLARS with interest from date hereof to maturity or until paid in full.

...⁷⁸

A cardinal principle of negotiable instruments law is that the negotiability of an

71. *Id.* at 62 (quoting U.C.C. § 3-104(1) (1989)).

72. *Id.* at 63.

73. *Id.*

74. *See id.* The court stated, "Society conditioned USAD's access to the line of credit by tracking the company's collateral. Lacking an unconditional promise to pay a sum certain, the line of credit falls outside the definition of a negotiable instrument." *Id.*

75. *See id.* at 65.

76. *See* U.C.C. § 3-104(1)(b) (1989) (in order to be a negotiable instrument, writing must "contain an unconditional promise . . . to pay . . . and no other promise . . . given by the maker . . .").

77. *Yin*, 665 N.E.2d at 66 (Sharpnack, C.J., concurring).

78. *Id.*

instrument must be determined from the face of the instrument.⁷⁹ This rule facilitates the free transferability of negotiable instruments by allowing the transferee “to trust what the instrument says, and be able to determine the validity of the note and its negotiability from the language of the note itself.”⁸⁰ This so-called “four corners rule” is crucial to the concept of holder in due course, as it means that “transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability or changes in terms, etc., contained in any separate documents.”⁸¹ Although the court of appeals mentions this rule in passing,⁸² it does not seem to have applied the rule in reaching its decision. As the concurring opinion states, the terms of the promissory note before the court show “a clear unconditional promise to pay two million dollars.”⁸³

The note did contain a notation in its right margin under the heading “disbursement” which stated “Draws to C/A #946009-372.” The concurring opinion suggests that the court relies on this language in concluding that the instrument does not contain an unconditional promise to pay a sum certain.⁸⁴ This “draws” language rationale for the court’s conclusion does have the advantage of placing the court’s analysis within the four corners rule. Even if this language is the true basis of the majority’s decision, however, the decision is still misguided.⁸⁵

79. See, e.g. U.C.C. § 3-105, Official Comment, Purposes of Changes (1989) (“This section is intended to make it clear that, so far as negotiability is affected, the conditional or unconditional character of the promise or order is to be determined by what is expressed in the instrument itself. . .”).

80. First State Bank v. Clark, 570 P.2d 1144, 1147 (N.M. 1977), *quoted in* Yin, 665 N.E.2d at 66 (Sharpnack, C.J., concurring).

81. *Id.* See also ROBERT L. JORDAN & WILLIAM D. WARREN, COMMERCIAL PAPER 669-670 (4th ed. 1997):

Merger theory and the ability of a good faith purchaser for value to take free of claims and defenses with respect to the instrument were based on a separation of the right to payment represented by the instrument from the transaction giving rise to the instrument. But merger theory assumed that the terms of the instrument were not inconsistent with separation from the underlying transaction, and that the terms of the right to receive payment could be determined simply by examination of the instrument itself. Thus the consequences of negotiability were applied by the common law courts only if the instrument met certain criteria that satisfied these assumptions.

82. See Yin, 665 N.E.2d at 62 (“note did not facially demand payment of a sum certain”).

83. *Id.* at 66 (Sharpnack, C.J., concurring).

84. *Id.* at 67.

85. The majority opinion mentions this language only in passing by stating, “The parties do not seriously dispute that the agreement in the present case is a line of credit upon which USAD could make draws of varying amounts. Indeed, the face of the note contains a notation regarding ‘draws.’” *Id.* at 62-63. The failure to focus on this language as important to its analysis is typical of the majority’s analysis, which is focused on the nature of the deal between the parties, not the terms of the instrument that was signed. Indeed, the majority opinion does not even mention what the note actually said.

As the concurring opinion notes, “[t]he ‘draws’ reference does not tell us anything, let alone that the parties may have issued this note in conjunction with a line of credit.”⁸⁶ More importantly, even if one could glean a reference to the line of credit from this language, such a reference in the note would not of itself destroy the note’s negotiability. Pre-revision U.C.C. section 3-105 states that a promise “is not made conditional by the fact that the instrument . . . states . . . the transaction which gave rise to the instrument, or that the promise . . . is made or the instrument matures in accordance with or “as per” such transaction.”⁸⁷

Chief Judge Sharpnack’s concurring opinion clearly contains the better analysis of the negotiability issue. Under the four corners rule of Article 3, the fact that the parties’ actual agreement may have placed conditions on payment or provided for different payment terms from those stated in the instrument is simply irrelevant to the negotiability determination as long as the terms of the instrument itself state an unconditional promise to pay a sum certain.⁸⁸ Thus, the majority’s focus in its analysis on the nature of the underlying transaction between the parties that gave rise to the instrument rather than on the language of the instrument itself was error.

B. Exclusivity of Article 3 Accommodation Party Defenses

Yin also raises the issue of whether the special defenses provided to accommodation parties under Article 3 are exclusive, precluding the assertion of suretyship defenses otherwise available to the accommodation party under the common law.⁸⁹ This issue was an important one in *Yin* because defendants’ best argument with regard to the existence of genuine issues of material fact precluding summary judgment related to the common law suretyship defense of discharge due to Society’s failure to notify them of USAD’s misconduct.⁹⁰ The majority opinion

86. *Id.* at 67 (Sharpnack, C.J., concurring).

87. U.C.C. § 3-105(1)(b) (1989). *Cf.* U.C.C. § 3-106(a) (1990) (“A reference to another writing does not of itself make the promise or order conditional.”)

88. *See* U.C.C. § 3-119 (1989) (Terms of an instrument may be modified or affected by any other written agreement executed as part of the same transaction, but “[a] separate agreement does not affect the negotiability of an instrument.”).

89. Pre-revision U.C.C. section 3-415 defines an accommodation party as “one who signs the instrument in any capacity for the purpose of lending his name to another party to it.” U.C.C. § 3-415(1) (1989). *Cf.* U.C.C. § 3-419(a) (1990) (accommodation party is a party to the instrument who “signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument”). An accommodation party is a type of surety. *See Farmers Loan & Trust Co. v. Letsinger*, 635 N.E.2d 194, 197 (Ind. Ct. App. 1994), *aff’d and adopted in part*, 652 N.E.2d 63 (Ind. 1995).

90.

Where, during the existence of the suretyship relation, the creditor discovers facts unknown to the surety which would give the surety the privilege of terminating his obligation to the creditor as to liability for subsequent defaults, and the creditor has reason to believe these facts are unknown to the surety and has a reasonable opportunity

in *Yin* did not reach the exclusivity issue because of the court's determination that there was no negotiable instrument involved and, therefore, that the only defenses applicable were those available at common law. Because Chief Judge Sharpnack would have found that a negotiable instrument was involved, he did reach this issue in his concurrence, concluding that the suretyship defenses found in pre-revision U.C.C. section 3-606 did not preclude resort to other suretyship defenses available at common law.⁹¹

Chief Judge Sharpnack's conclusion seems correct. U.C.C. section 1-103 provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."⁹² Not only does section 3-606 not contain any express language excluding other suretyship defenses,⁹³ but there is no indication that the purpose or policy of section 3-606 would be disserved by allowing accommodation parties to assert suretyship defenses other than those expressly contained in that section. An accommodation party "differs from other sureties only in that his liability is on the instrument and he is a surety for another party to it."⁹⁴ The Article 3 provisions dealing with accommodation parties are designed primarily to deal with aspects of accommodation party status that are influenced by the fact an accommodation party is also a party to a negotiable instrument, not to provide a comprehensive set of rules governing all aspects of suretyship status. As the Permanent Editorial Board of the Uniform Commercial Code stated in a recent PEB Commentary, the Article 3 sections dealing with accommodation parties "will not resolve all possible issues concerning the rights and duties of the surety," and when "a situation is presented that is not resolved by those sections, the resolution may be provided by the general law of suretyship because, pursuant to § 1-103, that law is applicable unless displaced by provisions of [the Code]."⁹⁵

to communicate them to the surety without a violation of the confidential duty, the creditor has a duty to notify the surety, and breach of this duty is a defense to the surety except in respect of his liability for defaults which have occurred before such disclosure should have been made.

RESTATEMENT OF SECURITY § 124(2) (1941). *See also* *Indiana Telco Fed. Credit Union v. Young*, 297 N.E.2d 434, 435 (Ind. App. 1973). *Yin* and *Kung* argued, and the court of appeals found, that there were genuine issues of material fact as to whether Society discovered facts unknown to *Yin* and *Kung* that would have given them the option to terminate their obligation to Society, whether Society had reason to believe *Yin* and *Kung* were unaware of these facts, and whether Society had a reasonable opportunity to communicate these facts to *Yin* and *Kung*. *Yin*, 665 N.E.2d at 65.

91. *Yin*, 665 N.E.2d at 68 (Sharpnack, C.J., concurring).

92. U.C.C. § 1-103 (1995).

93. Judge Sharpnack stated that "applying the mandate of [section 1-103], the common law defenses may not be excluded absent an express provision in [section 3-606]." *Yin*, 665 N.E.2d at 68 (Sharpnack, C.J., concurring).

94. U.C.C. § 3-415 cmt. 1 (1989).

95. PEB Commentary No. 11, Suretyship Issues Under Sections 3-116, 3-305, 3-415, 3-419, and 3-605 (1994). Although the PEB Commentary discusses the pre-revision provisions dealing with accommodation parties, its primary focus is on the relationship between the accommodation

C. Depositary Banks as Holders in Due Course

Normally, when a customer deposits a check in her account, the depositary bank merely acts as the customer's agent in collecting the check.⁹⁶ The depositary bank gives the customer a provisional credit in the amount of the check and forwards the check through the bank collection process for presentment to the payor bank. If the check is paid, the provisional credit becomes final;⁹⁷ if the check is dishonored, the depositary bank revokes the provisional credit, debiting the customer's account for the amount of the unpaid check.⁹⁸ The dishonored check is returned to the customer, who then has the task of attempting to collect from the drawer of the check. The depositary bank, however, becomes the holder of a check deposited with it by its customer,⁹⁹ and, if it meets the requirements of section 3-302, it can be a holder in due course.¹⁰⁰ As holder of the check, the depositary bank has the option of attempting to collect the check from the drawer rather than debiting its customer's account.

*Braden Corp. v. Citizens National Bank*¹⁰¹ involved an attempt by Citizens National Bank, as depositary bank with regard to a \$5000 dishonored check, to collect the amount of the dishonored check from Braden Corp., the corporation on whose account the check was drawn, and Braden's president, Frank W. Splittorff, who had signed the corporate check. The check was made payable to Polymer Technology Corp., an unrelated corporation of which Splittorff also was president.

party provisions of revised Article 3 and the common law of suretyship, particularly as stated in the Restatement of the Law (Third), Suretyship & Guaranty (1996). Revised Article 3 contains a more comprehensive treatment of accommodation party issues than the original Article 3, including suretyship defenses. Compare U.C.C. § 3-606 (1989) with U.C.C. § 3-605 (1990). Nevertheless, as the PEB Commentary illustrates, like the pre-revision Article 3, revised Article 3 was enacted against the backdrop of general suretyship law and relies upon the general law of suretyship to provide the applicable rules in the numerous areas not explicitly addressed by the Article 3 provisions.

96. See U.C.C. § 4-201(1) (1989) ("Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final, . . . the bank is an agent . . . of the owner of the item and any settlement given for the item is provisional."); U.C.C. § 4-201(a) (1990) (same rule).

97. See U.C.C. § 4-213(3) (1989); U.C.C. § 4-215(d) (1990).

98. See U.C.C. § 4-212(1) (1989); U.C.C. § 4-214(a) (1990).

99. Under pre-revision Articles 3 and 4 this was true at least in the vast majority of cases in which the customer indorsed the check before deposit. Revised section 4-205 provides that the depositary bank becomes the holder of checks deposited with it by its customers for collection whether or not the customer indorses the check. U.C.C. § 4-205(1) (1990).

100. Pre-revision U.C.C. section 3-302 provides that, in order to be a holder in due course, the holder must take the instrument (1) for value, (2) in good faith, and (3) "without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." U.C.C. § 3-302(1)(a)-(c) (1989).

101. 661 N.E.2d 838 (Ind. Ct. App. 1996).

Polymer deposited the check in its account with Citizens, and the \$5000 provisional credit given for the check was immediately applied to cover checks that Polymer had drawn on the account. Despite four presentments of the check to the payor bank for payment, the last made in person by an employee of Citizens, the check was never paid, and Citizens brought an action to collect the amount of the check, as well as for fraud and check deception, against Braden and Splittorff. The trial court granted summary judgment in favor of Citizens against both defendants. On appeal, Braden and Splittorff challenged the trial court's conclusion that Citizens was a holder in due course and thus not subject to defenses of bankruptcy, failure of consideration and waiver, and its holding that Splittorff was personally liable as drawer of the corporate check.

Applying pre-revision Articles 3 and 4, the Indiana Court of Appeals correctly rejected defendants' argument that Citizens was not a holder in due course because it had not given value for the check. Under pre-revision sections 4-208 and 4-209, a bank gives value with regard to a check deposited in an account "when credit given for the item has been withdrawn or applied."¹⁰² Citizens thus gave value for the check when it applied the provisional credit given for the check to cover checks Polymer had drawn on its account.

The court of appeals also seems correct in rejecting defendants' further argument that Citizens was not a holder in due course because it had a duty to debit Polymer's account when the check was first dishonored, rather than re-presenting the check for payment, and its failure to do so constituted a failure to mitigate damages that barred any recovery. Pre-revision U.C.C. section 4-212 states that the bank "may revoke" the settlement given its customer and charge back the customer's account, not that it "must" do so, and that "failure to charge back or claim refund does not affect other rights of the bank against the customer or any other party."¹⁰³ Like any other holder of a negotiable instrument, the depository bank may choose among the options available to it for collecting on the instrument.¹⁰⁴

The court of appeals' further determination that because Citizens was a holder in due course it took free of defendants' defenses is, however, somewhat muddled because the court cites to the wrong subsection of section 3-305 to support its

102. U.C.C. § 4-208(1)(a) (1989); *accord* U.C.C. § 4-210(a)(1) (1990).

103. U.C.C. § 4-212(1), (5) (1989); *accord* U.C.C. § 4-214(a), (e) (1990).

104. As a practical matter, of course, the depository bank is not like any other holder for the very reason that it is the depository bank and, therefore, has a ready source for shifting loss from nonpayment in the form of its customer's account, as long as that account contains sufficient funds to charge back against. The fact that the depository bank's charge-back remedy is more convenient than any of the remedies available to nonbank holders, however, has never been found persuasive by the drafters as a reason for providing different rules for banks in this regard. In fact, the general tenor of Article 4 has been to provide banks maximum flexibility in choosing how they will deal with items in the collection process. *See, e.g.*, U.C.C. § 4-107 (1989) (allowing bank to set cutoff hour for deposits); *id.* § 4-103 (allowing variation of Code provisions by agreement). At any rate, re-presentment, at least once, is an eminently reasonable option; most dishonored checks are paid upon re-presentment.

conclusion. The court states that Citizens is not subject to defendants' defenses of bankruptcy, failure of consideration or waiver because under section 3-305(1) "a holder in due course takes the instrument free from all claims to it on the part of any person."¹⁰⁵ Although it is indeed true that a holder in due course takes free of all claims, Braden and Splittorff were not asserting a claim to the instrument. They were asserting defenses to payment.¹⁰⁶ The distinction between claims and defenses is not a mere technicality; it is crucial to the determination of whether the holder in due course is protected from the assertions being made. Although a holder in due course takes free of all claims, a holder in due course does *not* take free of all defenses, and one of the defenses to which a holder in due course is subject is "discharge in insolvency proceedings."¹⁰⁷ The opinion does not discuss the nature of the "bankruptcy" defense that defendants asserted; if it were an assertion of discharge in bankruptcy, then Citizens' holder in due course status would not protect the bank under pre-revision section 3-305(2)(d).

D. Personal Liability of Authorized Representative

The *Braden* court also upheld the trial court's determination that Splittorff was personally liable on the check.¹⁰⁸ Splittorff argued that he had signed the check in his capacity as president of Braden Corp., not individually. Splittorff, however, had failed to indicate his corporate capacity by placing "president" after his name when he signed the corporate check as drawer. Pre-revision section 3-403 provides that, except as between the immediate parties to the transaction, an authorized representative is personally obligated on a negotiable instrument "if the instrument names the person represented but does not show that the representative signed in a representative capacity."¹⁰⁹ Splittorff's signature seems to fall within the language of this rule.

Nevertheless, some courts applying pre-revision section 3-403 have refused to find personal liability when, as in *Braden*, the instrument involved was a check of the represented entity that clearly showed the name of the represented entity and the fact that the check was drawn on that entity's account.¹¹⁰ The rationale for these decisions is, in effect, that when the instrument signed is a check payable from the account of the represented entity, that fact itself means that the instrument shows that the representative signed in a representative capacity. Indeed, if the person signing were not signing in her representative capacity, then it seems there

105. *Braden*, 661 N.E.2d at 841 (citing U.C.C. § 3-305(1) (1989)).

106. A claim is an assertion of a superior property or possessory right to the instrument. A defense is an assertion of a reason why a person obligated to pay on the instrument can avoid that obligation.

107. U.C.C. § 3-305(2)(d) (1989).

108. *Braden*, 661 N.E.2d at 841.

109. U.C.C. § 3-403(2)(b) (1989).

110. See John S. Herbrand, Annotation, *Construction and Application of UCC § 3-403(2) Dealing with Personal Liability of Authorized Representative Who Signs Negotiable Instrument in His Own Name*, 97 A.L.R.3d 798 (1980).

would be no authorization for the payor bank to debit the represented entity's account, and no basis for finding the represented entity liable as drawer of the check.¹¹¹ Finding that an authorized representative is not personally liable under these circumstances seems the better result, and, as the court of appeals recognizes,¹¹² it is the result that would be reached under revised U.C.C. section 3-402(c).¹¹³ As the comment to revised section 3-402(c) states, "Virtually all checks used today are in personalized form which identify the person on whose account the check is drawn. In this case, nobody is deceived into thinking that the person signing the check is meant to be liable."¹¹⁴

III. NEW ARTICLE 5—LETTERS OF CREDIT

As of July 1, 1996, Article 5 of Indiana's Uniform Commercial Code, dealing with letters of credit, was replaced by a new Article 5.1, with conforming amendments to other Articles.¹¹⁵ Indiana's adoption of Revised Article 5, which was approved by NCCUSL and the ALI in 1995, makes Indiana a leader with respect to updating the Code.

Promulgated in the 1950s as part of the original Code project, the original Article 5 did not envision the tremendous growth in the use of letters of credit and the development of practices and technology unknown at that time.¹¹⁶ Indeed, original Article 5 had been criticized as containing "significant barriers" to the use

111. It therefore seems somewhat illogical to hold an authorized representative in Splitdorff's situation personally liable on the check, based on a theory that the representative will not be allowed to establish that he signed in a representative capacity, while at the same time holding the represented entity liable on the check as well, a result that would seem to require that the signature on the check in fact be that of the represented entity. In general, however, courts, including the *Braden* court, have not found this result particularly problematic.

112. *Braden*, 661 N.E.2d at 841 n.3.

113.

If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person.

U.C.C. § 3-402(c) (1990).

114. U.C.C. § 3-402 cmt. 3 (1990). The court of appeals also affirmed the trial court's award of treble damages pursuant to the Indiana Code section 34-4-30-1 with regard to the check deception claim. *Braden*, 661 N.E.2d at 842. For a discussion of the application of that statute to check deception cases, see Gerald L. Bepko, *Commercial Law*, 15 IND. L. REV. 109, 109-112 (1982).

115. IND. CODE §§ 26-1-5.1-101 to -117 (Supp. 1996).

116. See Prefatory Note, Revised Article 5, in 2B UNIFORM LAWS ANNOTATED 112, 112 (West Supp. 1997). See generally Symposium, *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 BUS. LAW. 1521 (1990) (comprehensive analysis by the A.B.A. Task Forces on the Study of UCC Article 5).

of electronic technology.¹¹⁷ As stated by the drafters, the goals in drafting new Article 5 were:

conforming the Article 5 rules to current customs and practices; accommodating new forms of Letters of Credit, changes in customs and practices, and evolving technology, particularly the use of electronic media; maintaining Letters of Credit as an inexpensive and efficient instrument facilitating trade; and resolving conflicts among reported decisions.¹¹⁸

A comprehensive analysis of the changes brought about by the revision would be far more detailed than possible in this Survey. Those attorneys who deal with letters of credit, whether on a regular basis or only occasionally, would be well advised to review carefully the new legislation, the extensive Official Comments prepared by the drafters, and related scholarly works.¹¹⁹

IV. ARTICLE 9—SECURED TRANSACTIONS

A. *Proceeds Paid to Third Parties in Ordinary Course*

U.C.C. section 9-306(2) provides that upon a disposition of collateral a security interest “continues in any identifiable proceeds” of the collateral.¹²⁰ The security interest in identifiable proceeds need not be expressly granted in the security agreement,¹²¹ and exists even though the interest in the original collateral has been cut off by the transfer generating the proceeds.¹²² If the security interest in proceeds is perfected in accordance with section 9-306(3),¹²³ then it has the

117. See R. David Whitaker, *Letters of Credit and Electronic Commerce*, 31 IDAHO L. REV. 699, 704-05 (1995).

118. Prefatory Note, Revised Article 5, in 2B UNIFORM LAWS ANNOTATED 112, 113 (West Supp. 1997). For some additional history concerning the drafting process, see James E. Byrne, *Internationalization of Revised UCC Article 5 (Letters of Credit)*, 16 NW. J. INT’L L. & BUS. 215 (1995); James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 NW. J. INT’L L. & BUS. 189 (1995) (Professor White was the Reporter for the revision of Article 5).

119. The Official Comments appear in both the Burns and West versions of the Indiana Code. For comprehensive discussion of the law of letters of credit, see JOHN F. DOLAN, *THE LAW OF LETTERS OF CREDIT* (rev. ed. 1996); 3 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE*, ch. 26 (4th ed. 1995).

120. U.C.C. § 9-306(2) (1995). “Proceeds” is defined as including “whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds.” *Id.* § 9-306(1).

121. *Id.* § 9-203(3) (“Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by Section 9-306.”).

122. See *id.* cmt. 2(a).

123. Under section 9-306(3), the security interest in proceeds is automatically perfected for ten days after the debtor’s receipt of the proceeds. In order to remain perfected after the ten days, the secured party’s situation must fall within one of three categories: (1) the proceeds are collateral

same priority as the security interest in the original collateral.¹²⁴ If the secured party has a perfected security interest in proceeds, that security interest is enforceable not only against the debtor, but also against third party transferees of proceeds,¹²⁵ and the secured party may bring an action for conversion to recover proceeds in the hands of a third party transferee.¹²⁶

Comment 2(c) to section 9-306, however, states an apparent limit on the rule of section 9-306(2) as it applies to cash proceeds:

Where cash proceeds are covered into the debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds. What has been said relates to payments and transfers in ordinary course. The law of fraudulent conveyances would no doubt in appropriate cases support recovery of proceeds by a secured party from a transferee out of ordinary course or otherwise in collusion with the debtor to defraud the secured party.¹²⁷

Although some courts have refused to recognize "payment in ordinary course" as cutting off a security interest in proceeds because the rule is contained in a comment rather than the text of the statute,¹²⁸ most courts, including those of Indiana,¹²⁹ have recognized the payment in ordinary course limit on the ability of a secured party to recover cash proceeds transferred by the debtor to a third party.¹³⁰ Comment 2(c)'s cryptic reference to "transfers in ordinary course" versus those "out of ordinary course," however, provides little guidance for courts in determining whether a secured party may recover cash proceeds in the hands of a third party transferee from the debtor.

In *HCC Credit Corp. v. Springs Valley Bank & Trust Co.*,¹³¹ the Indiana Court

that could be perfected by filing a financing statement in the office where the financing statement covering the original collateral has been filed, and, if the proceeds were acquired with cash proceeds, the description of collateral in the filed financing statement includes the type of property constituting the proceeds; (2) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or (3) the secured party has independently perfected the security interest in the proceeds within the ten day period. *Id.* § 9-306(3)(a)-(c).

124. *Id.* § 9-312(6) (for purposes of the first to file rule of section 9-312(5), "a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds").

125. *See id.* § 9-201 (security agreement is effective "between the parties, against purchasers of the collateral and against creditors" except as otherwise provided in the Act).

126. *Citizens Nat'l Bank v. Mid-States Dev. Co.*, 380 N.E.2d 1243, 1244 (Ind. App. 1978).

127. U.C.C. § 9-306 cmt. 2(c) (1995). "Cash proceeds" is defined as "[m]oney, checks deposit accounts, and the like." All other proceeds are referred to as "non-cash proceeds." *Id.* § 9-306(1).

128. *E.g.*, *Linn Coop. Oil Co. v. Norwest Bank*, 444 N.W.2d 497 (Iowa 1989).

129. *See Citizens Nat'l Bank*, 380 N.E.2d at 1250.

130. *J.I. Case Credit Corp. v. First Nat'l Bank*, 991 F.2d 1272, 1277 (7th Cir. 1993) (citing cases).

131. 669 N.E.2d 1001 (Ind. Ct. App. 1996), *trans. granted*, (Ind. Mar. 25, 1997).

of Appeals addressed the question of the appropriate contours for the payment in ordinary course exception. *HCC Credit* involved a priority dispute over proceeds of inventory between the inventory financier and a bank that received the proceeds in repayment of loans it had made to the debtor. Debtor, Lindsey Tractor Sales, Inc., was a farm machinery dealer that purchased machinery on credit from Hesston Corporation, secured by a perfected security interest in the machinery and its proceeds. Hesston assigned the security agreement to HCC Credit Corp. Under the security agreement, Lindsey was required to pay HCC the proceeds from sale of the financed equipment immediately upon sale.

In 1991, Lindsey sold fourteen tractors financed under the security agreement to the State of Indiana for \$199,122. Instead of turning the sales proceeds over to HCC as required by the security agreement, Lindsey deposited the proceeds into its checking account at Springs Valley Bank & Trust Co., where they were commingled with \$22,870 of non-proceeds funds. On the day after the deposit, Lindsey's president drew a \$212,104.75 check on this account to the order of Springs Valley in payment of four notes Lindsey owed Springs Valley, although three of the notes were not yet due. The bank did not know that part of the funds used to pay off the notes were proceeds subject to HCC's security interest. Lindsey subsequently filed bankruptcy, and HCC brought an action against Springs Valley to recover the proceeds Springs Valley had received from Lindsey. Both HCC and Springs Valley filed motions for summary judgment. The trial court granted Springs Valley's motion.¹³²

The court of appeals affirmed, finding that "under Comment 2(c), a payment is within the ordinary course if it was made in the operation of the debtor's business and if the payee did not know and was not reckless about whether the payment violated a third party's security interest."¹³³ With regard to the knowledge prong of this test, the court found that "[t]he critical factor is not whether the payee knew about the secured party's security interest, but whether the payee knew that the payment to it violated the security interest."¹³⁴ Here, there was no evidence to support an inference that Springs Valley knew Lindsey was violating its obligations under the security agreement.¹³⁵ The evidence also did not support any inference of reckless disregard of the fact the payment violated the security agreement.¹³⁶

132. *Id.* at 1002-03.

133. *Id.* at 1005 (quoting *J.I. Case Credit Corp. v. First Nat'l Bank*, 991 F.2d 1272, 1279 (7th Cir. 1993)).

134. *See id.*

135. *See id.*

136. *Id.* The court specifically rejected HCC's contention that "acceptance of an unprecedentedly large payment by a creditor is sufficient to support an inference of recklessness." *Id.* In dissent, Judge Kirsch agreed with the knowledge/recklessness standard adopted by the court, but would have found that Springs Valley's possible knowledge of the security interest or recklessness were material questions of fact that precluded summary judgment. Judge Kirsch specifically mentioned the fact the payment at issue "was for a sum greatly in excess of any other made by the debtor" to Springs Valley in support of his conclusion. *Id.* (Kirsch, J., dissenting).

In reaching its conclusion, the court of appeals adopted both the rule and the rationale of the Seventh Circuit in *J.I. Case Credit Corp. v. First Nat'l Bank of Madison County*.¹³⁷ In *Case*, the Seventh Circuit applied Indiana law to a set of facts similar to those in *HCC*. The Seventh Circuit reasoned that, because the language of comment 2(c) seemed to equate “out of ordinary course” with “collusion,” the most important factor to consider was “the payee’s knowledge about whether the payment was made with money that rightfully belongs to another.”¹³⁸ This conclusion was further supported by the Code’s definition of “buyer in ordinary course,” as one buying inter alia “in good faith and without knowledge that the sale to him is in violation of the . . . security interest of a third party.”¹³⁹ The court reasoned that use of the same “ordinary course” language in both comment 2(c) and section 1-201(9) suggested that the drafters intended factors stated in section 1-201(9) to apply to determinations of “ordinary course” under comment 2(c) as well.¹⁴⁰

As the court noted, “knowledge” under the Code means “actual knowledge;”¹⁴¹ recklessness, however, is “a mental state that the law commonly substitutes for actual knowledge,” and also is one that is inconsistent with the exercise of good faith required by section 1-201(9) in order to be in ordinary course.¹⁴² Therefore, the Seventh Circuit concluded that the appropriate standard should be one that included not only a transferee with actual knowledge that the transfer violated the secured party’s security interest, but also a transferee “who closes his eyes for fear that he may find that his accepting a payment will violate another’s interests.”¹⁴³

The Seventh Circuit also believed that a broad protection for transferees of cash proceeds was justified from a policy perspective. “Imposing liability too readily on payees from commingled accounts could impede the free flow of goods and services essential to business—including credit, the ‘good’ supplied by the Bank—as suppliers take steps to ensure that they will ultimately not have to return the money they receive.”¹⁴⁴

The knowledge/recklessness standard developed by the Seventh Circuit and adopted by the Indiana Court of Appeals in *HCC Credit* makes sense. Not only does this standard make the requirements for a transferee in ordinary course parallel those for a buyer in ordinary course, but it also places the risk of loss from the debtor’s misconduct with regard to proceeds on the secured party absent actual knowledge or willful avoidance of knowledge on the part of the transferee. This seems the most equitable result, as it is the secured party that has both the

137. 991 F.2d 1272 (7th Cir. 1993).

138. *Id.* at 1277. The court focused on the word “otherwise” in the phrase “out of ordinary course or otherwise in collusion with the debtor.” *Id.*

139. *Id.* (quoting U.C.C. § 1-201(9) (1995)).

140. *See id.*

141. *Id.* at 1278 (quoting U.C.C. § 1-201(25) (1995)).

142. *Id.*

143. *Id.*

144. *Id.* at 1277.

motivation and the ability to monitor the debtor's control and disposition of proceeds of collateral. Broad protection of transferees of cash proceeds thus not only protects the free flow of goods and services, but encourages responsible business practices on the part of secured parties.¹⁴⁵

Article 9 currently is being revised by NCCUSL and the ALI. The soundness of the conclusion that the exemption for transferees of cash proceeds in ordinary course should be a broad one is further illustrated by the treatment of this issue in the proposed revisions to Article 9. The current draft of revised Article 9 provides that "[a] transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party."¹⁴⁶ The revision draft's "collusion" standard, adopted from UCC Article 8,¹⁴⁷ is even more protective than the "actual knowledge/recklessness" standard adopted by the court of appeals in *HCC Credit*.¹⁴⁸

B. Article 9 Definition of "Instrument"

145. The less stringent standards adopted by other courts do not further these policies as well. For instance, the district court in *Case* had adopted essentially a negligence standard for determining whether a payment was out of ordinary course, holding that the payment was not in ordinary course because the bank knew facts which "should have put a reasonable bank, exercising prudent business practices, on notice that something was awry." *J.I. Case*, 991 F.2d at 1274. This standard would place the duty to inquire into the debtor's actions with regard to proceeds on persons receiving payments from the debtor rather than on the secured party. In *Harley-Davidson Motor Co. v. Bank of New England—Old Colony*, 897 F.2d 611 (1st Cir. 1990), the First Circuit applied a standard that focussed on the payee's conduct, asking whether the payee had acted "unreasonably or improperly" and had engaged in "conduct that, in the commercial context, is rather clearly improper." *Id.* As the Seventh Circuit noted in *Case*, a court's "notion of what constitutes good commercial policy is not sufficient to decide how broadly or narrowly to define ordinary course." *J.I. Case*, 991 F.2d at 1277. (It may, however, be relevant to the court's decision as to whether to allow equitable tracing, which was the issue upon which the First Circuit was focusing in *Old Colony*.)

146. U.C.C. § 9-329(b) (NCCUSL Annual Meeting Draft July 25-Aug. 1, 1997).

147. *See, e.g.* U.C.C. §§ 8-115, 8-503(e) (1995).

148. *See* U.C.C. § 9-329 cmt. 4 (NCCUSL Annual Meeting Draft July 25-Aug. 1, 1997) (collusion standard is "the most protective (i.e., least stringent) of the various standards now found in the UCC"). The policy rationale given by the drafters for this standard is similar to that found persuasive by the courts in *Case* and *HCC Credit*:

Broad protection for transferees helps to ensure that security interests in deposit accounts do not impair the free flow of funds. It also minimizes the likelihood that a secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules concerning recovery of payments traditionally have placed a high value on finality. The opportunity to upset a completed transaction, or even to place a completed transaction in jeopardy by bringing suit against the transferee of funds, should be severely limited.

Id. cmt. 3.

Unlike Article 3's definition of "negotiable instrument," which is based on certain formal requirements to be determined from the four corners of the document,¹⁴⁹ Article 9 employs a functional definition of "instrument." Collateral is classified as an instrument under Article 9 not only if it is an Article 3 negotiable instrument or an Article 8 certificated security, but also if it is "any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment."¹⁵⁰

In *Craft Products, Inc. v. Hartford Fire Insurance Co.*,¹⁵¹ the Indiana Court of Appeals addressed for the first time in Indiana the issue of whether a non-negotiable, non-transferable certificate of deposit (CD) should be classified as an instrument under Article 9. The CD involved was owned by Craft Products, Inc. and held by Valley American Bank for the company. Craft, the president and sole shareholder of Craft Products loaned the company \$1,285,000 secured by the CD. Craft attempted to perfect his security interest by filing in the UCC records. Apparently, he also initially retained possession of the CD, but he subsequently gave the CD to Amwest Surety Insurance as collateral for a bond. Craft Products ceased operations, and Craft foreclosed on the loan. Subsequent to this foreclosure, Hartford Fire Insurance Co. obtained a judgment against the company and attempted to garnish the CD, which by this point had been released by Amwest and was being held by Valley American Bank. Craft argued that, as a secured party with a prior perfected security interest in the CD, he had priority over Hartford. The trial court found that the CD was an instrument and that, therefore, a security interest in it could only be perfected by taking possession of the CD.¹⁵² Because Craft did not have possession of the CD, the trial court found that Craft did not have a perfected interest in the CD and, therefore, did not have priority over Hartford's garnishment lien.¹⁵³

Because the parties did not dispute the trial court's finding that the CD was not a negotiable instrument,¹⁵⁴ the issue on appeal was whether the CD was a "writing . . . which is in ordinary course of business transferred by delivery."¹⁵⁵ Craft argued that the legend on the CD stating that it was "non-transferrable" should be controlling on the issue. The court of appeals correctly rejected this argument, noting that under Article 9

149. See text accompanying *supra* notes 60-62.

150. U.C.C. § 9-105(1)(i) (1995).

151. 670 N.E.2d 959 (Ind. Ct. App. 1996).

152. See U.C.C. § 9-304(1) (1995) (security interest in an instrument other than a certificated security must be perfected by secured party taking possession).

153. *Craft Prods.*, 670 N.E.2d at 960. See U.C.C. § 9-301 (unperfected security interest is subordinate to rights of a lien creditor).

154. A CD can be a negotiable instrument if it meets the formal requirements for negotiability in U.C.C. section 3-104. See U.C.C. § 3-104(a)(1)-(3) (1990) (requirements for negotiability); *id.* § 3-104(j) (defining "certificate of deposit").

155. *Craft Prods.*, 670 N.E.2d at 961 (quoting U.C.C. § 9-105(1)(i) (1995)).

Instead of narrowly looking to the form of the writing, a court should instead look to the realities of the marketplace. If the evidence shows that the type of writing at issue is customarily transferred in the marketplace by delivery of possession, then the requirements of Article 9 are met.¹⁵⁶

Applying this test, the court of appeals found that, although the CD was labeled as non-negotiable and non-transferrable, in the “current usage of the marketplace” it nevertheless was transferable by delivery of possession, as evidenced by the fact Craft had delivered it to Amwest as security for a bond, and Amwest had returned possession of the CD to Valley American Bank when it released its interest in the CD.¹⁵⁷

156. *Id.* (citations omitted).

157. *Id.* See also *Cadle Co. v. Citizens Nat’l Bank*, No. 23539, 1997 WL 368627, at *3 (W. Va., July 3, 1997) (collecting cases).

RECENT CASES IN WORKER'S COMPENSATION LAW

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INTRODUCTION

This Article surveys recent cases arising under the Indiana Worker's Compensation Act¹ and the Indiana Occupational Diseases Act² (ODA) in Indiana and Federal courts. We draw not only on case law generated by the litigation of worker's compensation claims, but on a range of opinions arising out of civil actions in which the Act has become an issue.

Worker's compensation acts are a compromise between employers and employees designed to provide injured workers with a quick administrative remedy for work-related injuries while shielding employers from tort liability. Prior to the enactment of worker's compensation laws, employees could sue employers for work-related personal injuries. However, employees seldom prevailed at common law because employers invoked defenses such as assumption of risk and the fellow servant rule.³

Indiana's current worker's compensation law was enacted in 1929.⁴ Under the Act, covered employers, with the exception of the state, other governmental entities and banking associations,⁵ are required to carry insurance on worker's compensation liability.⁶ Employers may be authorized by the Worker's Compensation Board (Board) to self-insure.⁷

The compensability of injuries under the Act is conditioned on five factors:

- 1) covered employment relationship,
- 2) personal injury or death,
- 3) by accident,
- 4) arising out of the employment,
- 5) arising in the course of employment.⁸

Where the above elements are met, the employee is entitled to necessary medical treatment,⁹ statutorily prescribed compensation for lost wages,¹⁰ and scheduled

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1. IND. CODE §§ 22-3-1-1 to 22-3-6-3 (1993 & Supp. 1996).

2. *Id.* § 22-3-7.

3. See 1 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 4.30 (1990).

4. Act of Mar. 14, 1929, ch. 172, 1929 Ind. Acts 536.

5. IND. CODE § 22-3-2-5 (1993).

6. *Id.* § 22-3-5-1(a)(1).

7. See *id.* § 22-3-5-3(a).

8. See *id.* § 22-3-2-2(a).

9. See *id.* § 22-3-3-4(a).

10. See *id.* § 22-3-3-8 (Temporary Total Disability, Permanent Total Disability); *Id.* § 22-3-3-9 (Temporary Partial Disability).

compensation for permanent impairment.¹¹ In such cases, the Board's jurisdiction is exclusive, barring civil suits against employers for personal injury or death arising out of and in the course of employment. This exclusivity does not bar the employee from pursuing civil actions against third party tortfeasors.¹²

If a dispute arises over the compensability of a claim, the employee may file the Application for Adjustment of Claim¹³ (Application) entitling the employee to a hearing before a member of the Board,¹⁴ whose decision may be reviewed by the full Board.¹⁵ Decisions of the full Board may be reviewed by the Indiana Court of Appeals.¹⁶

I. EXCLUSIVE REMEDY CASES

A. *Employee Suits Against Employers*

The exclusive remedy provision of the Act¹⁷ is a perennial source of litigation, and was the subject of four significant cases during the survey period. As courts have noted since *Evans v. Yankeetown Dock Corp.*,¹⁸ the provision represents "a 'quid pro quo in which sacrifices and gains of employees and employers are to some extent put in balance.'"¹⁹ Although individuals injured in the course of employment are largely assured of medical treatment and compensation, employers are protected from the burdens of vexatious civil litigation. The limitation of awards to medical expenses and statutorily-prescribed compensation for lost wages and permanent impairment is perhaps at the root of plaintiff's attempts to circumvent the exclusive remedy of worker's compensation.

1. *Tacket v. General Motors Corp.*²⁰—*Tacket* addressed two significant types of challenges to the Act's exclusivity provision. The first challenge involved intentional torts and the second challenge involved claims of purely emotional damages.²¹ In so doing, *Tacket* provided an important explanation and application of what it termed "the *Baker* trilogy"²² in the context of a wrongful discharge claim.

11. See *id.* § 22-3-3-10(c).

12. See *id.* § 22-3-2-13; *Stump v. Commercial Union*, 601 N.E.2d 327, 330 (Ind. 1992); *Williams v. R.H. Marlin, Inc.*, 656 N.E.2d 1145, 1150 (Ind. Ct. App. 1995).

13. The Application (Indiana State Form 29109) is the functional equivalent of a complaint in civil procedure.

14. IND. CODE § 22-3-4-5 (1993).

15. *Id.* § 22-3-4-7.

16. *Id.* § 22-3-4-8.

17. *Id.* § 22-3-2-6.

18. 481 N.E.2d 969 (Ind. 1986).

19. *Hurd v. Monsanto Co.*, 908 F. Supp. 604, 609 (S.D. Ind. 1995) (citing 2 LARSON, *supra* note 3, § 65.10). See also *Evans*, 481 N.E.2d at 971.

20. *Tacket v. General Motors Corp.*, 93 F.3d 332 (7th Cir. 1996).

21. *Id.* at 333-34.

22. *Id.* at 335 (citing *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271 (Ind. 1994)).

The "*Baker* trilogy" refers to three cases decided by the Indiana Supreme Court in 1994.²³ *Baker*, while rejecting the term "intentional tort exception" as previously coined in *National Can*,²⁴ nonetheless reaffirmed that intentional torts fall outside the Act's purview. The *Baker* court reasoned that, because the Act refers to injuries that occur "by accident," and because an injury that is intended by the employer or the employee cannot be said to be accidental, "intentional torts of an employer are necessarily beyond the pale of the act."²⁵ Moreover, *Baker* found that the intent must be that of the corporate entity, not merely a supervisor, manager or foreman.²⁶

In *Foshee v. Shoney's, Inc.*,²⁷ the second case of the *Baker* trilogy, the court rejected a claimant's argument that she had met this "intent" requirement by alleging that her employer had "'allowed' events to transpire which posed 'an imminent likelihood of injury or death to the Plaintiff and where this injury or death was substantially certain to occur.'"²⁸ The court interpreted *Baker* to impose a clear two-part test: "The tort must have been committed by the employer (or by the employer's alter ego), and the employer must also have intended the injury or actually known that injury was certain to occur."²⁹

Perry,³⁰ the third case in the trilogy, demonstrated that a claimant may escape the Act's exclusivity provision if certain nonphysical injuries are alleged.³¹

The *Tacket* court applied both the "intent" and the "emotional injury" lessons of the *Baker* trilogy. *Tacket's* litigation odyssey commenced after someone painted "Tacket Tacket What a Racket" on the wall of the GM assembly plant where Tacket worked. As the Seventh Circuit put it, "[t]o say that litigation ensued would be an understatement."³² Two weeks after Tacket's original defamation suit against GM ended with a directed verdict in the employer's favor, the company fired Tacket. Tacket then sued in federal court for wrongful discharge, alleging intentional infliction of emotional distress.

The district court granted the employer's summary judgment motion on the ground that Tacket's claim was barred by the exclusivity provision of the Act.³³

23. For a complete discussion on these three cases, see G. Terrence Coriden & Daniel G. Foote, 1994 *Survey of Recent Developments in Worker's Compensation*, 28 IND. L. REV. 1141 (1995).

24. *National Can Corp. v. Jovanovich*, 503 N.E.2d 1224 (Ind. Ct. App. 1987), *overruled by Baker*, 637 N.E.2d at 1273.

25. *Baker*, 637 N.E.2d at 1273. "Intentional" was defined as "nothing short of deliberate intent to inflict an injury, or actual knowledge that any injury is certain to occur, will suffice. See *Tacket*, 93 F.3d at 334 (quoting *Baker*, 637 N.E.2d at 1275).

26. See *Tacket*, 93 F.3d at 334 (citing *Baker*, 637 N.E.2d at 1275).

27. 637 N.E.2d 1277 (Ind. 1994).

28. *Id.* at 1279 (quoting plaintiff's complaint).

29. *Id.* at 1281.

30. *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282 (Ind. 1994).

31. *Perry*, 637 N.E.2d at 1288-89.

32. *Tacket*, 93 F.3d at 333.

33. *Id.*

On appeal, the Seventh Circuit held that Tacket's claim failed because he had shown neither that GM was the "alter ego" of the supervisors who had fired him, nor that there was any evidence of a corporate policy to fire employees who file a lawsuit.³⁴ "Absent any such evidence, Tacket cannot establish that General Motors, as a corporate entity distinct from any of its managers, intended to injure him."³⁵

However, the Seventh Circuit found that the third case of the Baker trilogy—*Perry*—did provide "a thin reed on which [Tacket's] claim remains afloat."³⁶ Like the plaintiff in *Perry*, Tacket alleged emotional injuries rather than an impairment, disability, or physical injury within the meaning of the Act. Therefore, the court reinstated Tacket's claim for non-physical injuries, and noted that recovery for any physical injuries was still solely within the province of the Indiana Worker's Compensation Board.³⁷

What *Tacket* does not address directly is the applicability of the Act to nonphysical "stress" injuries arising out of employment. A number of cases, most importantly *Hanson v. Von Duprin*,³⁸ have held that such harms are not necessarily outside the Act's coverage. *Perry* did not specifically overrule these cases, but may raise questions as to the compensability of non-physical "stress" claims coverage under the Act, to the extent such claims were compensable prior to *Perry*.

2. *Hurd v. Monsanto Co.*³⁹—In *Hurd*, Westinghouse employees attempted to bring a class action lawsuit against their employer and Monsanto, the manufacturer of PCBs,⁴⁰ alleging that the companies had deliberately exposed them to dangerous chemicals. Class certification was denied, but two employees continued the suit.⁴¹ Both defendants filed motions to dismiss. The employer's motion was based on the exclusivity provisions in both the Act⁴² and the ODA.⁴³ The trial court granted the motions and the plaintiffs appealed.

Both plaintiffs had worked at Westinghouse for over thirty years. During that time, plaintiffs were exposed to PCBs, which are carcinogenic. Plaintiffs alleged that the defendants had intentionally withheld information regarding the hazards of working with PCBs. Both plaintiffs had physical symptoms which they linked to the exposure. The suit included counts for fraud, conversion, battery, breach

34. *Id.*

35. *Id.* at 335.

36. *Id.*

37. *Id.*

38. *Hanson v. Von Duprin, Inc.*, 507 N.E.2d 573 (Ind. 1987).

39. 908 F. Supp. 604 (S.D. Ind. 1995).

40. Polychlorinated biphenyl dielectric fluid.

41. *Hurd*, 908 F. Supp. at 607.

42. IND. CODE § 22-3-2-6 (1993).

43. *Id.* § 22-3-7-10. The ODA did not apply to the facts involved because the ODA requires a showing of disability, or inability to work. *Id.* "Disabled" means that an employee cannot work, but in this case both employees continued to work. Therefore, the court found that the ODA did not apply to the facts of this case. *Hurd*, 908 F. Supp. at 609.

of contract, and intentional harm, and sought punitive damages against Westinghouse.

Plaintiffs argued simply that “a cause of action based on an intentional tort does not fall under the preview [sic] of the Worker’s Compensation Act.”⁴⁴ The court responded to plaintiffs’ assertion by noting that intentional torts are outside of the Act only when the employer “intends to inflict an injury or has actual knowledge that an injury is certain to occur.”⁴⁵ However, plaintiffs did not show that Westinghouse intended to inflict any injury nor had knowledge that an injury was certain to occur.⁴⁶

Plaintiffs alleged in their complaint that Westinghouse kept information from its employees with the knowledge that injury was certain to occur. However, the court addressed this allegation by reviewing other facts alleged in the complaint. For instance, the complaint stated that injuries from PCBs are “likely” and that exposure to PCBs increases the “risks” associated with the job.⁴⁷ Therefore, the court concluded that Plaintiffs had failed to establish that Westinghouse had knowledge that injury was certain to occur.⁴⁸

In essence, the court declined to broaden the standard of intent and knowledge established in *Baker* to include situations where the injury is “likely” to occur or where the “risks” of injury are increased.⁴⁹ The court held that an employer’s knowledge that an injury is substantially certain to occur is insufficient.⁵⁰ Ultimately, the court adhered to the standard of *Baker* that the employer must have known that injury was “certain” to occur.⁵¹

3. *Campbell v. Eckman/Freeman Associates*.⁵²—In *Campbell*, the court decided that a “rehabilitation specialist” hired by the employer was not shielded by the exclusive remedy provision of the Act. Campbell injured his arm at work and received medical benefits and temporary total disability compensation. The employer’s insurance carrier hired a rehabilitation specialist whose duty is to “assist and monitor the care given to injured employees while the employee is receiving medical care and rehabilitation.”⁵³ After Campbell’s worker’s compensation claim was settled, he filed a negligence suit alleging that the rehabilitation specialist and his treating physician⁵⁴ had caused nerve and muscle

44. *Hurd*, 908 F. Supp. at 610.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Campbell v. Eckman/Freeman & Assocs.*, 670 N.E.2d 925 (Ind. Ct. App. 1996), *trans. denied*.

53. *Id.* at 927.

54. The pro se plaintiff initially filed the Indiana Department of Insurance form complaint for medical malpractice. The physician was dismissed from the action due to plaintiff’s failure to submit the case to a medical review panel. Eckman/Freeman did not move for dismissal on the

damage to his shoulder and arm, which resulted in pain and suffering, loss of wages, and mental anguish.

Eckman/Freeman's summary judgment motion was granted by the trial court, and Campbell appealed. Eckman/Freeman argued that because it was hired by the employer's insurance carrier, it was immune from a negligence suit by Campbell because of the exclusivity provision of the Act.⁵⁵ The court recognized that the Act does not allow actions against third party tortfeasors when the third party is the employee's employer or co-worker.⁵⁶

In holding that rehabilitation specialists are not exempt from liability for negligence, the court relied on *Stump v. Commercial Union*,⁵⁷ which held that the exclusive remedy provision does not bar an employee's action against the employer's worker's compensation carrier for injuries proximately caused by the carrier's tortious conduct.⁵⁸ Although the court noted that *Campbell* did not involve the unconscionable breach of a duty that occurred in *Stump*, the court did not believe that the Act was intended to shield third parties from liability for negligence arising out of their dealings with injured workers.⁵⁹

In examining the merits of the plaintiff's negligence claim, however, the court found that Eckman/Freeman did not owe a duty to the plaintiff.⁶⁰ Accordingly, the result below was affirmed.⁶¹

4. *Gonzalez v. Clinton*.⁶²—The *Gonzalez* decision illustrates the difficulty facing a plaintiff who hopes to escape the exclusivity of the Act. Alexandra Gonzalez was a passenger in the car her husband was driving when the car was struck from behind by Clinton, a co-worker. Gonzalez attempted to circumvent the exclusivity provision of the Act in order to sue Clinton.

Gonzalez, her husband and Clinton were all employees of Inland Steel. Clinton and Mr. Gonzalez had just completed their work shift and were leaving Inland's parking lot when the accident occurred. Mrs. Gonzalez originally testified that she was not scheduled to work that day, but instead, had come to the plant to pick up her husband. However, Mrs. Gonzalez later changed her testimony to add that she was at a work-related meeting prior to meeting her husband. Later, she admitted that she had not attended a meeting, but had instead stopped to visit a co-worker about a personal matter.

On appeal, Mrs. Gonzalez argued that the trial court should not have

same grounds because it is not a health care provider as defined under the Medical Malpractice Act.

55. *Id.* at 929. The court first noted that a summary judgment motion is inappropriate where the Act's exclusivity provision is raised as a bar to plaintiff's complaint. *Id.* (citing *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994)).

56. *Eckman/Freeman*, 670 N.E.2d at 930.

57. 601 N.E.2d 327 (Ind. 1992).

58. *Id.* at 332. *Stump* specified the "tortious conduct" as a gross negligence, intentional infliction of emotional distress, or constructive fraud. *See id.* at 333.

59. *Eckman/Freeman*, 670 N.E.2d at 931-32.

60. *Id.* at 934.

61. *Id.* at 935.

62. 663 N.E.2d 1157 (Ind. Ct. App. 1996).

dismissed her claim because she was engaged in a personal mission and was thus outside the Act. The court noted that if an employee is not engaged in work for the employer, but is solely on a personal mission on the employer's premises, the injury is not covered by the Act because it does not arise out of the employment.⁶³ However, more importantly, the court held that once a defendant raises the exclusivity provision of the Act, the employee has the burden to prove that the claim falls outside of the Act.⁶⁴

Mrs. Gonzalez had the burden of proving that she was engaged in a personal mission, and that her claim was therefore outside of the Act. In this regard, the court found that Mrs. Gonzalez had failed to meet her burden. The court found that Mrs. Gonzalez's statements regarding her purpose at the plant were inconsistent and unreliable.⁶⁵ Therefore, the court concluded that Mrs. Gonzalez had not sustained her burden of proving that she was on a personal mission, and the trial court was affirmed.⁶⁶

B. Suits Against the Employer's Compensation Carrier

1. *Background: Stump v. Commercial Union.*⁶⁷—In 1992, the Indiana Supreme Court held that the exclusive remedy provision of the Act did not bar an action against an employer's compensation insurance carrier for injuries proximately caused by the the carrier's fraud, gross negligence, or intentional infliction of emotional distress.⁶⁸ The court cited authority in which injuries allegedly caused by the carrier did not arise out of the employment.⁶⁹ The court refused to "absolve worker's compensation insurance carriers . . . of their responsibilities in the event of additional injuries or harm proximately caused by their actionable conduct."⁷⁰

The *Stump* decision has resulted in a series of state and federal cases exploring the scope of a worker's compensation insurer's tort liability to injured workers.⁷¹

63. *Id.* at 1158 (citing *Lona v. Sosa*, 420 N.E.2d 890, 894-95 (Ind. Ct. App. 1981)).

64. *Id.*

65. *Id.*

66. *Id.*

67. 601 N.E.2d 327 (1992).

68. *Id.* at 332.

69. *Id.* at 330 (citing *Baker v. American States Ins. Co.*, 428 N.E.2d 1342 (Ind. Ct. App. 1981)).

70. *Id.* at 331.

71. *See ITT Hartford Ins. Group v. Trowbridge*, 626 N.E.2d 567 (Ind. Ct. App. 1993) (holding that claimant who sued carrier under theories of intentional infliction of emotional distress, fraud, and intentional deprivation of statutory rights must demonstrate successful resolution of his worker's compensation claim before proceeding against the carrier); *see also Connecticut Indemnity Co. v. Bowman*, 652 N.E.2d 880 (Ind. Ct. App. 1995) (holding that the Board's denial of a motion for bad faith attorney fees under Indiana Code section 22-3-4-12 did not estop a claimant from litigating the issue of carrier bad faith in a civil claim, where the Board had not decided the fact issue of carrier bad faith because the claimant had brought his motion after the

2. *Rayford v. Lumberman's Mutual Casualty Co.*⁷²—*Rayford* indicates the care plaintiffs must take in demonstrating that the injuries complained of are caused by the insurance carrier and that the action is not merely an attempt to obtain civil damages for a work-related injury. In January 1992, Rayford suffered a compound and comminuted fracture of his right femur while working. Rayford received medical benefits and TTD compensation. He also attended psychological counseling on the advice of his lawyer and requested that Lumberman's cover the bills. Lumberman's paid for five sessions. After the fifth session, the counselor determined that Rayford exhibited suicidal tendencies, and he furnished a letter stating that Rayford needed further treatment.

Lumberman's refused to pay for additional counseling. In September 1992, Rayford attempted suicide. He was hospitalized and Lumberman's suspended TTD compensation and refused to pay for psychological services. At the time, Rayford did not file an Application with the Board.

Rayford's diversity suit alleged that the carrier's failure to provide psychological services directly resulted in his suicide attempt and constituted gross negligence. The insurer moved for dismissal, arguing that the suit was barred by the exclusive remedy provision. The court found that evidence indicated that Rayford's psychological problems resulted from the workplace accident and therefore his exclusive remedy was the Act.⁷³ Rayford's remedy, therefore, was to file an Application with the Board arguing entitlement to further medical benefits under the Act.⁷⁴

This case demonstrates that plaintiffs seeking recourse for alleged injuries in the federal courts must take care to establish an independent injury proximately caused by the insurance carrier. The court apparently did not consider whether Rayford's psychological problems, although traceable to a work-related injury, were tortiously exacerbated by the carrier's behavior.

3. *Fleischmann v. Wausau Business Insurance Co.*⁷⁵—The plaintiff in *Fleischmann* put a new spin on suits against worker's compensation insurance carriers, alleging that Wausau's negligent safety inspection of its insured's facility was the cause of her work-related injury. Like *Rayford*, *Fleischmann* highlights the burden on plaintiffs to establish an independent injury caused by the carrier that is distinguishable from the underlying injury arising out of and in the course of employment.

From August 1989 to August 1990 Wausau insured Styline Industries for worker's compensation liability. Under the policy, Wausau was entitled to conduct "safety surveys" at Styline plants, although by contract the surveys were not undertaken "to perform the duty of any person to provide for the health and safety of [Styline's] employees or the public."⁷⁶ In May 1990, a Wausau safety

parties had stipulated issues to be decided by the Board).

72. 44 F.3d 546 (7th Cir. 1995).

73. *Id.* at 548.

74. *Id.* at 549.

75. 671 N.E.2d 473 (Ind. Ct. App. 1996).

76. *Id.* at 475.

consultant inspected one of Styline's plants and recommended several safety improvements. In June 1990, Fleischmann lost her hand when it was pulled into a laminating machine that she was cleaning. Worker's compensation liability was accepted, and medical benefits and compensation were paid.

Subsequently, Fleischmann filed suit against Wausau, alleging that Wausau's negligence in conducting safety inspections at Styline should have revealed the safety problem that proximately caused her injury. Wausau filed a motion for summary judgment arguing that 1) the trial court lacked subject matter jurisdiction because of the exclusive remedy provision of the Act,⁷⁷ and 2) that Wausau was statutorily immune from liability. Fleischmann filed a cross-motion for summary judgment requesting that the trial court find that Wausau was not entitled to immunity. Both motions were denied, and an interlocutory appeal ensued.

Addressing the exclusivity issue, the court pointed out that the Act defines an employer to include the "employer's insurer so far as applicable."⁷⁸ Thus, while recognizing the *Stump* decision, the court reasoned that the tort liability of a carrier is limited by the exclusive remedy provision for accidental injuries arising out of and in the course of employment.⁷⁹ If a civil action against a carrier is to go forward, the plaintiff has the burden of showing that the claim falls outside of the coverage of the Act.⁸⁰

The court found that Fleischmann's claim was based solely on an accidental injury arising out of and in the course of employment and that she had not met her burden of showing that her injuries were caused by anything other than her work accident. Accordingly, the court reversed the denial of summary judgment.⁸¹

II. LIMITATIONS PERIOD AND THE JOURNEY'S ACCOUNT STATUTE

In July 1996, the court of appeals held that the Journey's Account Statute⁸²

77. On appeal, the court noted that a summary judgment motion which raises the issue of a trial court's lack of subject matter jurisdiction is properly before the court as a motion to dismiss, and will be treated as such under *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994). *Fleischmann*, 671 N.E.2d at 475.

78. *Fleischmann*, 671 N.E.2d at 476 (quoting IND. CODE § 22-3-6-1(a) (1993)).

79. *Id.*

80. *See id.* (citing *Campbell v. Eckman/Freeman & Assocs.*, 670 N.E.2d 925, 930 (Ind. Ct. App. 1996), *trans. denied*).

81. *Id.* at 477.

82.

(a) This section applies if a plaintiff commences an action and the plaintiff fails in the action from any cause except:

- (1) negligence in the prosecution of the action;
- (2) the action abates or is defeated by the death of a party; or
- (3) a judgment is arrested or reversed on appeal.

(b) If subsection (a) applies, a new action may be brought not later than the later of:

- (1) three (3) years after the date of such determination under subsection (a); or
- (2) the last date an action could have been commenced under the statute of

applies in worker's compensation cases.⁸³ That holding may allow worker's compensation plaintiffs additional time to file an Application with the Board in the event an action in another forum has abated.

Cox was employed as a welder for American Aggregates from April through October 1986. In March 1987, Cox, alleging intentional torts, filed a lawsuit against his employer. The court held that the claim was barred by the exclusive remedy provision.⁸⁴ Cox then filed an Application with the Board. American Aggregates argued that the Application was untimely, and the Board granted dismissal under the Act's two-year limitations statute.⁸⁵

On appeal, the court held that Cox's Application was saved from dismissal by the Journey's Account Statute.⁸⁶ The court applied the *Vesolowski*⁸⁷ analysis:

In order to claim the saving power of the Journey's Account Statute, a plaintiff must have filed his original cause of action timely. Moreover, the decision ending the original action must not have been on the merits. Finally, the plaintiff must meet the conditions set forth in the Journey's Account Statute.⁸⁸

At the time the statute of limitations dispute arose between Cox and his employer, the statute allowed five years to refile in a different forum in cases where the plaintiff's action failed for certain reasons.

It should be noted, however, the legislature amended the Journey's Account Act in 1993 to limit new filings to three years from the date the original action abated or the limitations period applicable in the new forum, whichever occurs later.⁸⁹ The holding in *Cox v. American Aggregates Corp.* may leave plaintiffs with an extended time frame for filing an Application with the Board after a civil suit filed against the employer is found barred by the exclusive remedy provision of the Act.

limitations governing the original action; and be considered a continuation of the original action commenced by the plaintiff.

IND. CODE § 34-1-2-8 (1993).

83. *Cox v. American Aggregates Corp.*, 667 N.E.2d 215, 218 (Ind. Ct. App. 1996).

84. *See Cox v. American Aggregates Corp.*, 580 N.E.2d 679 (Ind. Ct. App. 1991).

85. *Cox*, 667 N.E.2d at 216. "The right to compensation . . . shall be forever barred unless within two (2) years after the occurrence of the accident, or if death results therefrom, within two (2) years after such death, a claim for compensation shall be filed with the worker's compensation board." IND. CODE § 22-3-3-3 (1993).

86. *Cox*, 667 N.E.2d at 218.

87. *Vesolowski v. Repay*, 520 N.E.2d 433 (Ind. 1988).

88. *Cox*, 667 N.E.2d at 218 (citing *Vesolowski*, 520 N.E.2d at 435).

89. Act of Apr. 27, 1993, No. 239, 1993 Ind. Acts 4454 (codified at IND. CODE § 34-1-2-8 (1993)).

III. TEMPORARY PARTIAL DISABILITY

*Kohlman v. Indiana University*⁹⁰ established that temporary partial disability compensation is unavailable under the Act after the employee reaches maximum medical improvement.⁹¹ Temporary partial disability (TPD) compensation is designed to encourage employers and employees to agree to light or part-time duty during the healing period for a work-related injury. TPD makes up a portion of the difference between the employee's light duty wage and the employee's pre-injury wage. The issue in *Kohlman* is whether the Act provides temporary partial disability after the employee has reached maximum medical improvement.

Kohlman was employed as a bus driver for Indiana University when she hit a pot hole. The impact resulted in injuries to Kohlman's neck, wrists, hand, arm, and shoulder. Kohlman's claim was accepted as compensable under the Act, and she received temporary total disability compensation and a four percent permanent partial impairment rating, which equated to \$2000. Because of her injuries, Kohlman's treating physician and personal physician conditioned her release to return to work on restrictions that prevented her from driving the school bus. Indiana University provided Kohlman with a job as a receptionist, which was within her restrictions but paid a lower salary.

At the single hearing member level, both parties stipulated that the only issue was whether Kohlman could recover temporary partial disability because of the continuing wage loss she incurred as a result of the permanent restrictions placed upon her from the treating physician. Kohlman argued that a \$2000 impairment award did not even cover one year of the wage loss difference. The single hearing member found that Kohlman could not recover temporary partial disability after she had already reached maximum medical improvement and recovered an award for impairment. The full board affirmed the decision.

The court of appeals noted that no provision in the Act indicates that an employer is obligated to pay temporary partial disability benefits after the plaintiff's condition is permanent and quiescent.⁹² Accordingly, the court of appeals affirmed the Board's finding.⁹³ In so doing, the court expanded its holding in *Covarubias*,⁹⁴ which held that the plaintiff's inability to return to his original job did not justify an award of continuing temporary total disability compensation when the plaintiff had reached maximum medical improvement and had received an award for permanent impairment.⁹⁵

In response to the plaintiff's contention that the \$2000 for permanent partial impairment was unfair compared to the \$10,000 annual wage loss she suffered

90. 670 N.E.2d 42 (Ind. Ct. App. 1996).

91. See IND. CODE § 22-3-3-9 (1993).

92. *Kohlman*, 670 N.E.2d at 43-44.

93. *Id.* at 45.

94. *Covarubias v. Decatur Casting*, 358 N.E.2d 174 (Ind. App. 1976).

95. *Id.* The *Covarubias* court stated that "[o]nce the injury has reached a permanent and quiescent state, . . . the treatment period ends, and the extent of the permanent injury is assessed for compensation purposes." *Id.* at 176.

each year, the court stated that the Act was not intended to provide compensation to cover actual wage loss.⁹⁶ Instead, the Act is a series of carefully balanced compromises designed to share the social costs of work injuries.⁹⁷

As Professor Larson stated, "A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he or she has lost; it gives claimant a sum which, added to his or her remaining earning ability, if any, will presumably enable claimant to exist without being a burden to others."⁹⁸

IV. APPEALS FROM DECISIONS OF THE FULL WORKER'S COMPENSATION BOARD

Although most of the reported decisions interpreting provisions of the Act during this survey period arose out of civil litigation, two reported opinions were generated by appeals from the Full Worker's Compensation Board.

A. *Sneed v. Associated Group Insurance*⁹⁹

Sneed established that an assignment of errors, although required by the Act, is no longer necessary due to changes in the Indiana Appellate Rules.¹⁰⁰

Sneed was employed by Associated Group when she allegedly injured her knee in the company cafeteria. *Sneed* failed to report her fall until nearly two years after the occurrence, alleging that she had experienced a memory lapse. The single hearing member found in favor of the employer on the grounds that there was no medical documentation around the time of the fall and that the employee's explanation for failing to report the alleged injury was not credible. The full board affirmed the decision. *Sneed* appealed, but did not file an assignment of errors as required by statute.¹⁰¹

Effective February 1, 1996, the Indiana Supreme Court amended the appellate rules involving administrative agencies to eliminate the assignment of errors requirement.¹⁰² The appellate court acknowledged a conflict between the supreme court's order and the statute requiring an assignment of errors, but decided that the change was "ameliorative" and "designed to remove a procedural impediment that has thwarted numerous litigants in their efforts to invoke our jurisdiction to review

96. *Kohlman*, 670 N.E.2d at 44.

97. *Id.*

98. LARSON, *supra* note 3, § 2.50.

99. *Sneed v. Associated Group Ins.*, 663 N.E.2d 789 (Ind. Ct. App. 1996).

100. *Id.* at 794.

101. "An assignment of errors . . . shall be sufficient to present . . . the sufficiency of the evidence to sustain the findings of facts." IND. CODE § 22-3-4-8(d) (1993).

102.

It shall be unnecessary to file a separate assignment of errors in the Court of Appeals to assert that the decision of any board, agency, or other administrative body is contrary to law. All issues and grounds for appeal appropriately preserved before the board, agency of other administrative body may be initially address in the appellate brief.

IND. APP. R. 4(C).

agency decisions.”¹⁰³ Accordingly, the court applied the new appellate rule, which abolished the requirement of a separate filing for the assignment of errors to further the policy of deciding a case upon the merits whenever possible.¹⁰⁴

The court proceeded to decide the case on the merits finding evidence of probative value capable of sustaining the Board's conclusions the court affirmed the decision of the Full Worker's Compensation Board.¹⁰⁵

B. *Hancock v. Indiana School for the Blind*¹⁰⁶

In *Hancock*, the court of appeals addressed the discretion of the Board to choose between or to “average” permanent partial impairment ratings submitted by physicians. In practice, some hearing members are willing to average ratings, but others are reluctant to do so. The *Hancock* court apparently approved of a Board award that seemed to be based on a compromise of three medical reports, holding merely that there must be “competent evidence of probative value to support the Board's findings and that the findings must be sufficient to support the decision.”¹⁰⁷

Hancock sustained injuries when he tripped and fell at work. As a result of the accident, Hancock received several impairment ratings from several different physicians. One doctor assigned a 60% whole body impairment rating, another doctor assigned Hancock a 6% impairment to his lower extremity, and a third doctor gave him a 10% rating for his spine. The third doctor opined that the 10% spine rating and the 6% lower extremity rating should be added to make a 16% whole body rating. The single hearing member, faced with these ratings ranging from 16% to 60%, ultimately decided on a 25% whole body rating.

On appeal, the court held that the Board's finding of a 25% rating was within the evidence presented at the hearing and was sufficient to support the Board's decision.¹⁰⁸ Thus, the assignment of an impairment rating need not be based upon the specific rating of one physician.

V. PLANNING FOR WORKER'S COMPENSATION LIABILITY

A. *McQuade v. Draw Tite, Inc. Revisited*

The decision of the court of appeals in the case of *McQuade v. Draw Tite, Inc.* was reversed by the Indiana Supreme Court in December 1995.¹⁰⁹ The supreme court refused to entertain the defendant's request that the court “reverse pierce the corporate veil” to find that a separately-incorporated parent company was shielded

103. *Sneed*, 663 N.E.2d at 796.

104. *See, e.g., Maldonado v. State*, 355 N.E.2d 843, 848 (Ind. 1976).

105. *Sneed*, 663 N.E.2d at 797.

106. 651 N.E.2d 342 (Ind. Ct. App. 1995), *trans. denied*.

107. *Id.* at 344.

108. *Id.*

109. 638 N.E.2d 818 (Ind. Ct. App. 1994), *rev'd*, 659 N.E.2d 1016 (Ind. 1995). The court of appeals decision was discussed in Coriden & Foote, *supra* note 27, at 1151-52.

by the exclusive remedy provision from a civil suit by a subsidiary's employee.¹¹⁰ McQuade had argued that her employer's parent corporation was amenable to suit as a third party under section 22-3-2-13 of the Indiana Code.

In 1992, McQuade was injured while working for her employer, Mongo Electronics ("Mongo"), a subsidiary of Draw-Tite, Inc. ("Draw-Tite"). McQuade pursued her worker's compensation remedy against Mongo and also filed suit against Draw-Tite, alleging that it had assumed and negligently breached a duty of care for her job safety. The trial court granted summary judgment for Draw-Tite,¹¹¹ ruling that the exclusive remedy provision barred the suit, and the court of appeals affirmed.¹¹²

The court of appeals had indulged the defendant's request to "reverse pierce" the corporate veil, finding that its activities were so interconnected with Mongo's operations that they should be considered one employing entity for purposes of the Act.¹¹³ The Indiana Court of Appeals adopted a synthesis of two rules on the issue. First, in *Reboy v. Cozzi Iron & Metal*,¹¹⁴ the Seventh Circuit had held that separate corporate identities could be "disregarded where one corporation is so organized and controlled and its affairs are so conducted by another corporation that it is a mere instrumentality or adjunct of the other corporation."¹¹⁵ The court of appeals also looked to a Michigan case, *Verhaar v. Consumers Power Co.*¹¹⁶ which listed several factors to be applied in "reverse piercing the corporate veil," including: 1) the use of a combined worker's compensation policy; 2) combined bookkeeping and accounting system; 3) a single personnel policy; 4) control of the employee's duties; 5) payment of wages; and 6) performance of the employee's duties as an integral part of the employer's business toward the accomplishment of a common goal.¹¹⁷ Applying the rule, the court of appeals held the separate corporate identities should be disregarded and held McQuade's suit barred by the exclusivity provision.¹¹⁸

The supreme court reversed,¹¹⁹ adopting a more widely accepted approach to the issue of separate corporate identities and worker's compensation exclusivity. In *Boggs v. Blue Diamond Coal Co.*,¹²⁰ the court wrote:

110. *McQuade*, 659 N.E.2d at 1020.

111. The proper motion would have been a motion to dismiss for lack of subject matter jurisdiction under Trial Rule 12(b)(2). See *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282 (Ind. 1994).

112. *McQuade*, 638 N.E.2d at 818.

113. *McQuade*, 659 N.E.2d at 1017.

114. 9 F.3d 1303 (7th Cir. 1993).

115. *Id.* at 1308.

116. 446 N.W.2d 299 (Mich. Ct. App. 1989).

117. *Id.* at 300-01.

118. *McQuade v. Draw Tite, Inc.*, 638 N.E.2d 818, 822 (Ind. Ct. App. 1994), *rev'd*, 659 N.E.2d 1016 (Ind. 1995).

119. *McQuade*, 659 N.E.2d at 1020.

120. 590 F.2d 655 (6th Cir. 1979).

A business enterprise has a range of choice in controlling its own corporate structure. But reciprocal obligations arise as a result of the choice it makes. The owners may take advantage . . . of dividing the business into separate corporate parts, but principles or [sic] reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee.¹²¹

The Indiana Supreme Court recognized its equitable power to disregard the corporate form to prevent fraud or unfairness to third parties.¹²² However, the court also stated, "we perceive little likelihood that equity will ever require us to pierce the corporate veil to protect the same party that erected it."¹²³ Thus, the court concluded that the exclusive remedy provision does not prevent an employee from suing his or her employer's separately-incorporated parent corporation.¹²⁴

*B. D.A.X., Inc. v. Employers Insurance of Wausau*¹²⁵

D.A.X. addressed the problems of insuring worker's compensation liability for employers located in Indiana but employing workers in other states. The case mandated that employers disputing premium issues with worker's compensation insurance carriers exhaust administrative remedies through the Indiana Department of Insurance before resorting to the courts.¹²⁶ In this case, the employer's failure to carry worker's compensation insurance on workers who were found during an audit to be non-Indiana employees subjected the employer to a retroactive assessment of a non-Indiana premium by its compensation carrier.

D.A.X. was an employee leasing company incorporated in Illinois with an office located just across the state line in Hammond, Indiana. *D.A.X.* employed truck drivers that it leased exclusively to High Noon Express, a trucking company incorporated and based in Illinois. Both companies were owned by the same family. In December 1988, *D.A.X.* applied for worker's compensation coverage for its drivers through the Indiana Compensation Rating Bureau.¹²⁷ The application stated that *D.A.X.* had no "operations in States other than Indiana."

Wausau issued a policy providing that the calculated premium was an estimate and that if the employer's actual exposures were not accurately reflected in the application, a final premium would be assessed based on the actual exposure. In

121. *McQuade*, 659 N.E.2d at 1020 (citing *Boggs*, 590 F.2d at 661-62).

122. *Id.* (citing *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1231-32 (Ind. 1994)).

123. *Id.*

124. *Id.*

125. 659 N.E.2d 1150 (Ind. Ct. App. 1996).

126. *Id.* at 1158.

127. *See* IND. CODE § 27-7-2-28.1 (1993). The ICRB reviews the application to determine whether the risk should be assigned to one of its members. Every insurance carrier authorized to write worker's compensation policies in Indiana is a member of the ICRB. If the ICRB assigns the risk to one of its members, the insurer has a statutory duty to issue a policy. *See id.* § 27-7-2-29(b). However, the members must have costs of operating the plan, including any losses.

the case of trucking operations, the audit procedure allows the insurer to charge premiums based upon the employees' state of residence if the audit determines that the employer does not have a bona fide terminal within the state of Indiana.

When Wausau began receiving worker's compensation claims under the D.A.X. policy naming High Noon Express as the employer, it arranged for an audit and an inspection of the Hammond facilities operated by D.A.X. The inspector discovered that the office consisted of a leased space in a truck stop along a toll road, and contained one desk and three or four chairs. D.A.X. employees did not load, unload, store, or transfer freight at the location. Thereafter, Wausau requested D.A.X. to provide personnel records so that it could assess premiums based on the state of residence of the truck drivers. D.A.X. did not cooperate, and Wausau proceeded to make a premium determination based on limited information.

In May 1990, Wausau sent D.A.X. an audit premium adjustment requesting payment of an additional \$186,110 to cover risk under Illinois worker's compensation law. D.A.X. refused to pay the premium. Wausau filed suit and obtained a judgment in that amount.

On appeal, the court held that Wausau had properly assessed the non-Indiana premium and that D.A.X. was estopped from challenging the assessment in the courts because it had failed to exhaust administrative remedies.¹²⁸ An "aggrieved person" must seek administrative review of actions by the ICRB or the insurance carrier.¹²⁹ The trial court's order was therefore affirmed.¹³⁰

C. Davis v. Central Rent-a-Crane, Inc.¹³¹

In *Davis* the court of appeals visited the issue of "borrowed" employees in rejecting a plaintiff's lawsuit against a crane operator, Cole, and the crane operator's employer, Central Rent-a-Crane. Because the court found that Cole was a borrowed employee of the plaintiff's employer, and thus a fellow servant of

128. *D.A.X.*, 659 N.E.2d at 1158.

129.

Every company or the bureau shall provide within Indiana reasonable means whereby any person aggrieved by the application of its filings may be heard on written request to review the manner in which such rating system has been applied in connection with the insurance afforded or offered. If the company or the bureau fails to grant or reject such request within thirty (30) days, the aggrieved person may proceed in the same manner as if the request had been rejected. Any aggrieved person affected by the action of such company or the bureau on such request may, within thirty (30) days after written notice of such action, appeal to the [Insurance] commissioner who, after a hearing held upon not less than ten (10) days written notice to the aggrieved person and to such company or the bureau, may affirm, modify, or reverse such action.

IND. CODE § 27-7-2-20.3(c)(2) (1993).

130. *D.A.X.*, 659 N.E.2d at 1158.

131. 663 N.E.2d 1177 (Ind. Ct. App. 1996).

the plaintiff, the suit was held barred by the exclusive remedy provision.¹³²

Brandenburg Industrial leased a crane and crane operator from Central Rent-a-Crane. Davis, a Brandenburg employee, was working as foreman at a site where steel storage tanks were being dismantled when he was struck and injured by a piece of steel suspended from the leased crane. Davis and his wife sued Cole, the crane operator, and Central Rent-a-Crane for his injuries. The trial judge ruled for the defendants on the theory that Cole was a leased employee of Brandenburg, and as a co-employee of Davis, was protected from suit by the exclusive remedy provision of the Act.¹³³

On review, the court of appeals treated the grant of summary judgment as a motion to dismiss for lack of subject matter jurisdiction.¹³⁴ Because public policy favors the inclusion of employees under the Act, the burden of proving that a claim falls outside of the Act shifts to the plaintiff once the defendant raises the Act's exclusivity defense.¹³⁵

The trial court applied the seven-part test for determining whether an employer-employee relationship exists under *Hale v. Kemp*¹³⁶ and found that the operator of the crane was a borrowed employee.¹³⁷ The *Hale* factors are: 1) the right to discharge; 2) the mode of payment; 3) supplying tools or equipment; 4) belief of the parties in the existence of an employment relationship; 5) control over the means used in the results reached; 6) length of employment; and 7) establishment of the work boundaries.¹³⁸

The court below found that Brandenburg could discharge Cole if his work was unsatisfactory; that Brandenburg supplied the hooks and chains used by Cole; that Brandenburg employees directed and controlled Cole's actions with regard to what loads to lift and how to lift them; and that Davis had the authority to stop Cole if Cole did anything improper with the crane. Although Davis showed that Brandenburg did not pay Cole and instead paid Central Rent-a-Crane for his services, this evidence was insufficient to overcome the other *Hale* factors.¹³⁹ On appeal, the court refused to overturn the trial judge's findings that Davis and Cole were co-employees.¹⁴⁰ The court further noted that Davis' claim against Central under a theory of respondeat superior was also barred because a claim could not

132. *Id.* at 1180.

133. *See id.* at 1178.

134. *Id.* at 1179 (citing *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994) for the proposition that summary judgment is inappropriate for raising the exclusivity provision of the Act as a defense because it is an attack on the court's subject matter jurisdiction and summary judgment cannot be entered by a court without jurisdiction).

135. *See id.* (citing *Perry*, 637 N.E.2d at 1287).

136. 579 N.E.2d 63 (Ind. 1991).

137. *Davis*, 663 N.E.2d at 1179.

138. *Hale*, 579 N.E.2d at 67 (citing *Fox v. Contract Beverage Packers, Inc.*, 398 N.E.2d 709 (Ind. Ct. App. 1980)).

139. *Davis*, 663 N.E.2d at 1180.

140. *Id.*

be maintained against Cole.¹⁴¹

VI. PLAINTIFF'S ATTORNEY'S FEES IN WORKER'S COMPENSATION MATTERS

Attorneys representing employees should note the following two cases applying the rules of professional conduct to fee agreements in worker's compensation cases.

A. Rule 1.5(c) Requires Written Fee Agreements

In the case of *In re Anonymous*,¹⁴² the supreme court held that Rule 1.5(c) of the Rules of Professional Conduct¹⁴³ requires that contingent fee arrangements be memorialized in a writing.¹⁴⁴

The worker's compensation board, pursuant to statutory authority,¹⁴⁵ has adopted a contingent fee schedule governing claimant's attorney's fees.¹⁴⁶ The rule allows attorneys to retain fees from compensation recovered of: a minimum of \$100, and 20% upon the first \$10,000 recovered, 15% on the second \$10,000 recovered, and 10% on all recovery thereafter, although the Board may allow or order a different schedule in a proper case.¹⁴⁷ The Board may award fees not to exceed 10% of medical expenses actually in dispute and actually collected by the attorney upon proper application.¹⁴⁸

In the case of *In re Anonymous*, the attorney was retained to handle a worker's compensation matter and explained to the client that fees would be contingent upon recovery of benefits and limited by the Board's fee schedule. After settling the case, the attorney correctly applied the schedule in calculating fees charged to the client. The attorney did not, however, furnish the client with a written contingent fee agreement explaining the method by which fees would be calculated, stating that he believed that the Board's published fee schedule obviated any need to do so.

In holding that Rule 1.5(c) requires a written fee agreement in worker's compensation matters, the court reasoned that such agreements reduce the possibility of misunderstandings.¹⁴⁹ The court advised against the assumption that

141. *Id.* (citing *Riffle v. Knecht Excavating, Inc.*, 647 N.E.2d 334, 337 (Ind. Ct. App. 1995)).

142. 657 N.E.2d 394 (Ind. 1995).

143. "A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. . . ." IND. R. PROF. CONDUCT 1.5(c).

144. *In re Anonymous*, 657 N.E.2d at 395.

145. "When any claimant for compensation is represented by an attorney in the prosecution of his claim, the industrial board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fees." IND. CODE § 22-3-4-12 (1993).

146. *See* IND. ADMIN. CODE tit. 631, r. 1-1-24 (1996). No Board limitation applies to fees payable to defense counsel.

147. *See id.*

148. *See id.*

149. *In re Anonymous*, 657 N.E.2d at 395 (citing G. HAZARD & W. HODES, *THE LAW OF LAWYERING*, § 1.5 (2d ed. 1990)).

clients will fully understand fee provisions established by law absent the presentation of a written agreement and found that principles underlying the requirement of a writing are as applicable to situations where fee schedules apply as where they do not.¹⁵⁰

B. Fee Agreements in Excess of Board Schedule and Rule 1.5(a)

In a subsequent case, an attorney fee agreement calling for fees exceeding the amounts provided by the Board's schedule was declared unreasonable under Rule 1.5(a) of the Rules of Professional Conduct.¹⁵¹

In 1987, the attorney undertook representation of a client in contemplation of a worker's compensation action or related third party suit. The fee agreement included a provision for a 20% fee contingent on recovery before the Board. Thereafter, the attorney filed an Application under the Occupational Diseases Act.¹⁵² In 1989, the client signed a renegotiated contingent fee contract, agreeing to pay the attorney upon recovery 33 1/3% for recovery upon Board hearing, 40% for recovery upon appeal to the court of appeals, and 50% for recovery upon appeal to the supreme court. The contract further provided "This agreement is made in recognition of the fact that the case is extremely complicated and involves necessary attorney time in excess of the typical case." The attorney did not advise the client of the provisions of the Board's attorney fee schedule.¹⁵³

In 1988, the case was heard by a member of the Board, and in 1989 the Board entered an award of compensation to be paid at the weekly rate of one hundred \$178 for five hundred weeks, for a total of \$89,000. The Board's decision included an award of attorney's fees specifically reciting the provisions of 631 I.A.C. 1-1-24. Under the Board's fee schedule, the attorney fee award would have totaled \$10,500.

Fifteen days later, the employer appealed the decision to the full Board. The attorney filed a petition before the Board for approval to charge fees in excess of the Board's schedule, arguing that he had been required to expend a large number of hours on the case. In March 1990, the full Board affirmed the single member's award in all respects, denying the petition for additional fees. In April, the employer issued a check for \$34,354 to the employee and her attorney,¹⁵⁴ out of which the attorney took a fee of \$27,000.

Fees in excess of the presumptive limits in 631 I.A.C. 1-1-24 have been held

150. *Id.*

151. *In re Maley*, 674 N.E.2d 544 (Ind. 1996).

152. The Occupational Diseases Act is administered by the Board but provides compensation and benefits for "death or disablement arising out of and in the course of employment." IND. CODE § 22-3-7-2 (1993).

153. IND. ADMIN. CODE tit. 631, r. 1-1-24 (1996).

154. The court's opinion does not make clear why the employer did not issue a check for the total amount of the award, \$89,000. It is possible that the payment was a partial lump sum intended to bring the client up to date on compensation due since the date her disability began.

unenforceable.¹⁵⁵ Finding that the attorney retained fees in excess of the Board's rule without obtaining approval of the Board and without advising the client that the fee agreement was unenforceable, the court held the fee unreasonable and in violation of Rule 1.5(a).¹⁵⁶

In recommending an appropriate discipline, the disciplinary commission's hearing officer noted several mitigating circumstances. The attorney had a clean disciplinary record after thirty-eight years of practice in Indiana. Colleagues described him as "well-prepared," "honest," and "diligent." The attorney testified that he had expended 500 hours on his client's case. Finally, the attorney and his client had settled their fee dispute, where in open court the attorney apologized to his client.

The court, however, noting that the attorney had deliberately kept a fee far in excess than that allowed by law, found that the "public import" of excessive fees requires a sanction greater than a private reprimand.¹⁵⁷ Accordingly, the attorney was sanctioned by public reprimand and admonishment.¹⁵⁸

VII. DEFINITION OF AGRICULTURAL EMPLOYEE

Certain types of employments are exempt from mandatory worker's compensation coverage under the Act.¹⁵⁹ Among the exemptions are those for "farm" and "agricultural" employments.¹⁶⁰ The meaning of the term "agricultural employee" as used in the Act was explored in *Rieheman v. Cornerstone Seeds, Inc.*¹⁶¹

Cornerstone Seeds was a wholesaler which sold seed corn to retailers. Cornerstone hired teams of workers to detassel corn during a three-week period each July. Corn detasslers were transported by truck to the fields, where they pulled the tassels from the tops of corn plants. Rieheman was severely injured when she slipped and fell and was struck by a Cornerstone truck.

Rieheman filed a civil suit against her employer. Cornerstone filed a motion to dismiss for lack of subject matter jurisdiction, on the theory that the suit was barred by the exclusive remedy provision of the Act. The trial court found that Rieheman was not an exempt farm employee and granted the employer's motion.

On appeal, Rieheman argued that her civil suit against Cornerstone was viable because the corn detasslers were exempt agricultural employees.¹⁶² Cornerstone argued that because it engaged in a business that farmers do not ordinarily

155. *Maley*, 674 N.E.2d at 546 (citing *Buckler v. Hilt*, 200 N.E. 219 (Ind. 1936); *Bauer v. Biel*, 177 N.E.2d 269 (Ind. App. 1961)); *Rickert v. Schreiber*, 66 N.E.2d 769 (Ind. App. 1946)).

156. *Id.*

157. *Id.* at 547 (citing *In re Myers*, 663 N.E.2d 771, 774 (Ind. 1996)).

158. *Id.*

159. For a detailed summary of coverage requirements, see DANIEL G. FOOTE, GUIDE TO INDIANA WORKER'S COMPENSATION § 2, at 6-14 (1996).

160. IND. CODE § 22-3-2-9(a) (1993).

161. 671 N.E.2d 489 (Ind. Ct. App. 1996), *trans. denied*.

162. See IND. CODE § 22-3-2-9(a) (1993).

conduct, and because corn detassellers perform tasks not ordinarily conducted by farmers, Rieheman was not a farm or agricultural employee and that her lawsuit was therefore barred by the exclusive remedy provision.

Cornerstone's defense ran up against a long-established line of cases holding that worker status is determined by the character of the work performed by the employee and not by the general occupation or business of the employer.¹⁶³ Indiana has long held that the term "agriculture" relates to "the science or art of cultivating the soil, producing crops, and raising livestock . . ."¹⁶⁴ Thus, the fact that Cornerstone was a "wholesale production company" and not a farm was not relevant.¹⁶⁵

The court further pointed to a distinction between the "farm" and "agricultural" employments and held that Rieheman was an agricultural worker.¹⁶⁶ Although the terms have substantially the same meaning, if there is any difference, the latter has the broader meaning.¹⁶⁷ Thus, if Rieheman was not a farm worker, her work was agricultural in nature, bringing her within the broader "agricultural" exemption. Holding that Rieheman was an exempt agricultural employee, the court reversed the trial court's dismissal of her civil suit.¹⁶⁸

The *Rieheman* case reminds employers that there is a significant risk of civil liability to businesses with employees performing agricultural work. Businesses that have agricultural operations may wish to consider the costs and benefits of electing worker's compensation coverage under the Act¹⁶⁹ in order to avoid potential tort liability.

The many farm and agricultural employees exempted from the Act¹⁷⁰ face the possibility of carrying the burden of work-related injuries or passing costs on to their families or the taxpayers. Where workers pursue civil litigation, they face long delays and powerful common-law defenses. Indiana is one of a small number of states that retains a statutory exemption for farm or agricultural employments.¹⁷¹

163. See *Rieheman*, 671 N.E.2d at 491-92 (citing *Evansville Veneer & Lumber Co. v. Mullen*, 65 N.E.2d 742, 743-44 (Ind. App. 1946)). The same rule was cited in *Smart v. Hardesty*, 149 N.E.2d 547, 549 (Ind. 1958); *Strickler v. Sloan*, 141 N.E.2d 863, 866 (Ind. App. 1957); and *Heffner v. White*, 45 N.E.2d 342, 345 (Ind. App. 1942).

164. *Rieheman*, 671 N.E.2d at 492. Although the court cited Webster's Ninth New Collegiate Dictionary for its definition of agriculture, a similar definition has been cited in Indiana cases. See *Fleckles v. Hille*, 149 N.E. 915, 915 (Ind. App. 1925).

165. See *Rieheman*, 671 N.E.2d at 493.

166. *Id.*

167. See *id.* at 492.

168. *Id.* at 493.

169. An employer who is exempt from the Act under Indiana Code section 22-3-2-9(a) may waive such exemption and accept the Act's provisions upon notification of the employee and the Worker's Compensation Board. See IND. CODE § 22-3-2-9(b) (1993).

170. *Id.* § 22-3-2-9(a).

171. As of 1990, 39 worker's compensation jurisdictions covered agricultural workers, with 14 jurisdictions extending the same coverage available to all workers and 25 imposing some restrictions not applicable to the general class of employees. See 4 LARSON, *supra* note 3, at app.

That exemption recently withstood a state equal protection challenge.¹⁷²

VIII. SECOND INJURY FUND

On November 14, 1996 the Indiana Supreme Court denied transfer in the case of *Linville v. Hoosier Trim Products*.¹⁷³ The denial of transfer means that the Second Injury Fund's interpretation of the statute will stand.

At issue in the *Linville* litigation were the definitions of the terms "loss or loss of use" and "total permanent impairment" as used in section 22-3-3-13(a) of the Indiana Code.¹⁷⁴ *Linville*, having suffered a preexisting 11% permanent partial impairment to her right hand, suffered subsequent work-related injury resulting in a 37% impairment to her left hand and applied for second injury benefits. Because *Linville* had neither "lost nor lost the use of" her hands, the administrator of the fund denied her petition for benefits, and a single hearing member and the full board affirmed the denial.

Unbeknownst to the Second Injury Fund,¹⁷⁵ *Linville* took her case to the court of appeals. In December 1995, the court handed down a decision favorable to *Linville*.¹⁷⁶ Writing for the majority, Judge Riley concluded that section 22-3-3-13(a) of the Indiana Code merely required a *partial* loss or *partial* loss of use of two of the listed body parts, as opposed to successive amputations or *total* losses of use.¹⁷⁷

The court reversed itself on rehearing,¹⁷⁸ requiring that petitioners for second injury benefits show the amputation of total loss of two of the body parts listed in section 22-3-3-13(a) of the Indiana Code in order to qualify for section 13(a)

A-4-1.

172. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). For discussion, see Coriden & Foote, *supra* note 23, at 1158-62.

173. 664 N.E.2d 1178 (Ind. Ct. App. 1996), *trans. denied*. The decision below was discussed in Gregory M. Feary & Steven M. Pletcher, *1995 Developments in Worker's Compensation*, 29 IND. L. REV. 1139, 1155-56 (1996).

174.

If an employee who from any cause, had lost, or lost the use of, one (1) hand, one (1) arm, one (1) foot, one (1) leg, or one (1) eye, and in a subsequent industrial accident becomes permanently and totally impaired by reason of the loss, or loss of use of, another such member or eye, the employer shall be liable only for the compensation payable for such second injury. However, in addition to such compensation and after the completion of the payment therefor, the employee shall be paid the remainder of the compensation that would be due for such total permanent impairment out of a special fund known as the second injury fund

IND. CODE § 22-3-3-13(a) (1993).

175. The Second Injury Fund failed to appear for argument or file a brief.

176. *Linville v. Hoosier Trim Prods.*, 659 N.E.2d 250 (Ind. Ct. App. 1995), *vacated on reh'g*, 664 N.E.2d 1178 (Ind. Ct. App. 1996), *trans. denied*.

177. *Id.*

178. *Linville*, 664 N.E.2d at 1178.

benefits.

IX. RECOVERING WORKER'S COMPENSATION LIENS

As discussed previously, injured workers have the right to pursue third party tortfeasors for civil damages. In the event the employee recovers from a third party, the employee has the option of either collecting the judgment and repaying the employer or the employer's compensation insurance carrier for compensation previously drawn or assigning the rights under the judgment to the employer or the insurance carrier.¹⁷⁹ Although *Protective Insurance Co. v. Cody*¹⁸⁰ is a textbook civil procedure case, it merits a glance from attorneys counseling employers or employees in situations in which an employer asserts a worker's compensation lien.

The defendants in the case, all residents of Pennsylvania, were involved in a work-related auto accident in West Virginia. Their employer, Morgan Drive Away (MDA), was an Indiana corporation. The accident was caused by the negligence of a third party resident of Ontario, Canada. The plaintiff-carrier in the case, Protective Insurance, was incorporated in Indiana and paid worker's compensation to the accident victims.

Each of the victims later reached settlements with the third party, entitling Protective to its statutory lien on worker's compensation paid.¹⁸¹ Protective sought to enforce its lien by filing a diversity action in the United States District Court for the Southern District of Indiana. The defendants filed a motion to dismiss for lack of personal jurisdiction.¹⁸² At issue was whether the defendants' "contacts" with the State of Indiana would reach a minimum threshold satisfying the requirements of specific personal jurisdiction.¹⁸³

Protective asserted the existence of three "contacts" between the defendants and Indiana. First, the defendants knowingly entered into an employment contract with the local agent of an Indiana corporation. The court, however, found that employment activities of the defendants were centered in Pennsylvania, and that employment negotiations actually took place there after the defendants responded to an advertisement in a Pennsylvania newspaper.¹⁸⁴

Second, the defendants submitted and received employment-related documents such as tax forms and paychecks from the employer's Indiana headquarters. The court found Protective's reliance on this evidence unpersuasive because "[t]he defendant's conduct in relation to the forum state, not the unilateral actions of the plaintiff" determine jurisdiction."¹⁸⁵ Third, Protective argued that the defendants' acceptance of worker's compensation benefits paid

179. IND. CODE § 22-3-2-13 (1993).

180. 882 F. Supp. 782 (S.D. Ind. 1995).

181. See IND. CODE § 22-3-2-13.

182. FED. R. CIV. P. 12(b)(2).

183. *Protective*, 882 F. Supp. at 785.

184. *Id.* at 786.

185. *Id.* (quoting *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992)).

pursuant to Indiana worker's compensation law qualified as a minimum contact. The court held that the payment of worker's compensation to an employee does not establish contacts between the employee and the forum state.¹⁸⁶ "Rather, [the defendants] simply accepted the workers' benefits provided by MDA without any personal involvement in the negotiation process between MDA and its insurance carrier."¹⁸⁷ The defendants had originally sought worker's compensation under Pennsylvania law.

The court thus refused to hale the defendants into an Indiana court simply because their worker's compensation claims had been treated under Indiana law, holding that an assertion of personal jurisdiction over the defendants would not comport with "fair play and substantial justice" where the defendants did not reside, nor commence, their relationship within the state of Indiana.¹⁸⁸

CONCLUSION

As these recent cases show, Indiana's worker's compensation law continues to balance the compromise between employers and employees by providing an administrative remedy for injured workers while shielding employers from civil liability. During the survey period, the courts have undertaken to apply the holdings of the Indiana Supreme Court in the *Baker* trilogy. We look forward with interest to the impact of these decisions.

186. *Id.* at 787.

187. *Id.*

188. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

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